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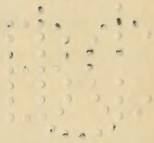
THE REFERENCE SHELF

Volume V Number 6

JURY SYSTEM



Compiled by
JULIA E. JOHNSEN

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INTRODUCTION

The administration of justice in the United States presents many examples of glaring inefficiency. Miscarriages of justice, escape of the guilty from punishment, the alarming growth of crime, these and more are cited as evidence of the failure of our courts. In the resulting scrutiny of the entire judicial system, as well as the criminological system, it is not surprising that much criticism has been directed to a phase very close to the popular interest, the institution that has been considered the very bulwark of democratic liberties—the jury.

It is interesting to note that the jury system has been under discussion from the days of Blackstone, and probably earlier, down to the present time. However the immediate interest lies with the jury of today. To what extent has it become an outgrown institution and an anomaly which should, in the interests of progress, be discarded; to what extent is it being blamed for conditions for which it cannot reasonably be held responsible; to what extent is it still a vital institution and a safeguard of liberty which should be retained; to what extent should reforms modify it in the interests of its sound and enduring principles, these are questions that merit thoughtful consideration. That the jury system as now operating is perfect, no one will claim.

This volume of the Reference Shelf is intended to treat the jury system in its broad and varied aspects, excluding the more purely technical. In particular, it will be found to touch upon three leading propositions of discussion or debate, i.e. that the jury system should be abolished; that decision by three judges should replace

decision by jury; and that three-quarters majority of a jury, or less than a unanimous vote, should be sufficient to render a decision except in the matter of inflicting the death penalty. For convenience, material and bibliography are grouped as general material, material favorable to the jury, and material opposed to the jury. A brief sums up some of the leading arguments for and against its abolition. Bibliographical references useful to consult on the substitution of judges in place of the jury are followed by the abbreviated classification (GJ) (FJ) (AJ) referring to arguments general, for or against judges. The same plan is followed with the abbreviations (GU) (FU) (AU) referring to the unanimous verdict or unit vote of the jury. The volume is further intended for the general reader who may be interested in the readings covering this particular and popular phase of our juridical system.

JULIA E. JOHNSEN

February 16, 1928

CONTENTS

Discussion Opposed to Jury

BRIEF

RESOLVED: *That the jury system should be abolished.*

AFFIRMATIVE

I. The jury system should be abolished because we have outgrown it.
   A. It has outlived its original purpose.
      1. It is no longer necessary as a political protection.
         a. Tyrannical power cannot be said to exist.
      2. It is not necessary as a protection against the judiciary.
         a. The majority of judges are elected by the people or by their elected representatives.
         b. Their character is such that no danger exists.
            (1) Their honesty, fearlessness, and integrity are well known.
            (2) Cases of corruption and scandal are exceedingly rare.
   B. It has deteriorated.
      1. We have modified the original jury until its true functions have been obscured.
         a. The jury trial is no longer, as a rule, a trial under the joint responsibility of judge and jury.
            (1) In many cases the judge has become a mere umpire.
            (2) The jury is consequently burdened with a responsibility

greater than it is qualified to assume.

(3) Its true function is to decide facts under the direction and guidance of the court.

b. It encourages the exclusion of those having the slightest knowledge of the facts.

c. It is bound up with rules of evidence and procedure that permit and facilitate the obscurring and misrepresentation of truth.

(1) The jury is not expected to draw conclusions from the failure of the accused person to testify in his own behalf, or from evidence which has been stricken out by objection of the opposing side.

(2) Technicality tends to become more important than justice.

d. It permits changes of venue to remove cause from its original jurisdiction.

e. It gives the defense many advantages not given to the prosecution, with the result that there is in many cases a failure of justice for which the state has no remedy.

C. Much of the dissatisfaction of our law administration is due to the fact that it has not kept pace with social and political changes.

1. The jury is an important obstruction to more progressive methods.

a. It is a weak link which destroys the effectiveness of the whole.

b. It is closely related to the whole sys-

tem of justice, with its inefficiency, delays, obstructions, costs, general weaknesses and failure.

c. It is largely responsible for our disproportionately high rate of crime.

(1) Its delays, leniency, etc. are responsible for much of the contempt of law by criminals.

2. We need the same efficiency, certainty, and promptness in justice as is applied in any other department.

II. The jury system is grossly inefficient as a trier of facts.

A. It is not qualified mentally or by experience to try facts.

1. The intellectual characteristics of the average jury are low.

a. No educational qualification exists.

b. The more intellectual and responsible classes are exempt.

(1) Various important professional and occupational classes.

(2) Men whose positions are so important they would suffer loss by service.

c. A good portion of juries are feeble and colorless, made up of loiterers, hangers-on, professional jurors, and persons of no responsibility.

2. It is not qualified to judge evidence.

a. To listen attentively, remember testimony, weigh evidence frequently highly technical, understand instructions on the law sometimes long and complicated, apply the law to facts.

(1) This requires training and high intelligence.

3. It is ruled by prejudice and emotion rather than by reason.
   a. There is a tendency to prejudice against corporations, employers, and those of different religion or race.
   b. This frequently results in much injustice.

B. The jury system is in large measure responsible for the delays of our court system.
   1. The loss of time in impaneling jurors.
      a. Sometimes days or even weeks are lost in this.
         (1) Lawyers use their peremptory challenges not so much to secure an impartial jury as one which they can handle.
   2. Rules which seek to protect the jury from perverting the ends of justice, and the mistakes of inefficient juries, crowd our dockets with appeals, reversals, and new trials.
      a. Violation of these rules by judge, counsel or jury afford grounds for new trial.
      b. Many objections to testimony slow up trials.
   3. The delays result in the prevention of much just litigation.

C. The jury is expensive and wasteful.
   1. The cost of slow justice, appeals, new trials, etc. to states and litigants is excessive.
   2. There are costly changes of venue.
   3. It invites lavish use of money in hiring counsel.

4. It is wasteful of human effort.
   a. Costly to jurors and wasteful of their time.

D. The defects are such that they cannot be remedied if the jury is retained, but must be cast out.
   1. They are fundamentally inherent and in the main cannot be done away with by remedial legislation.
      a. The low intellectual standard will always remain.
         (1) The exemptions cannot be cut down as they are mostly in occupations which require the person's daily presence.
      b. Intellectual qualifications would be difficult to make.
         (1) They would, moreover, cause much resentment.
      c. The tendency of jurors to be led by prejudice, bias, and emotion cannot be corrected by legislation.
         (1) They are human traits and will always remain.
      d. The law of evidence cannot be done away with.
         (1) The nature and weaknesses of the jury require such rules to enable it to reach a just result, free from wrong influences.

III. The judge is superior to the jury as a trier of facts and is the best substitute for it.

A. The judge has many advantages over the jury.
   1. He is better qualified by training and experience.
      a. His training in logical thinking bet-

ter qualifies him to consider intricate issues and technical questions.

b. He is an expert in the law.

c. Years on the bench qualify him to discriminate between witnesses, testimony, etc.

2. He is more responsible.

a. By reason of his more permanent position.

(1) The jury is a transient body drawn for a single term or case.

b. By reason of professional interest.

(1) The jury frequently has no individual interest in a case.

(2) The juror is beset by business and home worries and by unfamiliar and confusing conditions of the court room and trial.

c. The judge is sensible of responsibility to those who elected him.

(1) The jury is chosen by lot and is irresponsible.

d. The judge is generally anxious to uphold the dignity of the bench.

3. The judge is close to the facts of every day life, and not prone to be unduly governed by technicalities and legal distinctions.

a. In active practice, before elevation to the bench, he has usually acquired a larger experience with every day facts than ordinary men.

4. The judge is not easily influenced.

a. The reputation of the judiciary is very high.

5. The judge is required to state reasons for his decisions.
   a. The jury is not required to do this.

B. The rules of evidence admit the juries' weakness.
   1. In English courts and federal courts of the United States the judge sums up evidence giving the jury advice and guidance.
      a. This is an admission of the inability of the jurors to reason as to facts and the superiority of the judges.
   2. Rules of procedure and evidence sift testimony which shall reach the juror.

C. The judge has proved his worth.
   1. In equity courts in England and in the United States the jury is rarely used.
   2. The jury is excluded in courts of admiralty, bankruptcy, and probate.
   3. Many states make it optional in civil cases to use a jury.
   4. On the continent the jury is not used except in criminal cases.
   5. The proposed change would, therefore, involve the adoption of a system already tried and approved.

D. The change would bring about desirable reforms in our juridical system.
   1. It would result in doing away with technical rules of evidence that prevent witnesses from telling all.
   2. It would tend to do away with many of the delays, appeals, retrials, etc.
      a. This would result in an enormous saving of time and money.

3. It would remove incentive for the corruption of the jury.
4. It would raise the standard of the legal profession.
   a. Cases not based on a just cause will be done away with.
      (1) There is little incentive to bring such cases before a judge.
   b. Pettifoggers, shysters, ambulance-chasers would be eliminated.
   c. Arguments tending to mislead and befog issues would be less tolerated.

NEGATIVE

I. The jury system should not be abolished.
   A. The jury is one of the most fundamental of our democratic institutions.
      1. It is embodied in our Constitution.
      2. The right of trial by one's peers has been the bulwark of liberty in the past.
         a. It has protected the people from tyranny.
         b. It has upheld liberty and progress.
      3. It is close to the people.
      4. Its abolition would destroy a cardinal principle of free and popular government.
   B. It is essential to our liberties in the present.
      1. Against the oppression or abuse of democracy.
         a. All corrupt, reactionary, and unbridled forces.
            (1) The misuse of the press.
            (2) The judiciary.
            (3) Governments by indictment and injunction.

(4) Ambitious prosecutors who work for personal fame at the expense of justice.

C. Dissatisfaction with the administration of the law is not due to the jury system alone, or even fundamentally to it.
   1. The jury is only part of a larger problem of obtaining prompt and efficient justice.
      a. The entire juridical and criminological systems are concerned with such failure.
      b. The jury is not reasonably responsible for the failures of the other parts.

D. The jury is not inherently defective in itself.
   1. Some of its evils are merely superficial and can be done away with.
      a. The quality of jurors can be improved.
      b. Its only fundamental defect is the defect of human nature.
         (1) This is inherent in any system of human justice.

II. The jury system is fundamentally sound, efficient, and meritorious.

A. It is qualified to try facts.
   1. It is not essential to confine jury service to those of intellectual training or to experts.
      a. Education is merely relative and is not analogous to wisdom.
      b. No man can be an expert on all problems.
   2. The jury represents the average sense of justice of the community.

a. It is moral and conscientious as a rule.

3. Its true function is merely to judge facts through fair intelligence and an open mind.
4. The fact that it may be governed by prejudice and emotion is no valid objection.
   a. All men are prejudiced to some extent.
      (1) Judges are themselves susceptible to it.
   b. They rise above it when fairly appealed to.
   c. The quality of human feeling is a valuable asset.
      (1) It keeps justice free from the hardening influence of legal concepts.

B. In the large majority of cases the jury administers justice.
   1. Verdicts are generally just.
      a. This is testified to by eminent jurists.
      b. Faulty verdicts may not be wholly the fault of the jury.
         (1) Procedure may obscure truth.
         (2) The charge of the judge may mislead the jury.
         (3) Some issues are extremely difficult to decide.
         (4) No tribunal can render perfect justice in all cases.
   2. Disagreements are relatively infrequent.
      a. When they occur they may be a positive good rather than a cause for criticism.

(1) A case concerning which there is any doubt should be reviewed.

(a) Frequently new facts and evidence can be brought to bear.

(b) The reasonable doubt of a single man is sometimes the only protection against rank injustice.

3. The jury is a valuable balance in the scales of social justice and in the long run makes for progress.

a. It sees the problem of crime in relation to the larger problem of social responsibility, environment, ignorance, etc.

b. It is inherently resentful of blindfold justice, and justice contrary to the social sense.

(1) The "dead hand," punishment disproportionate to the offense or motive, punishment which makes a man worse than he would otherwise be, etc.

(2) This is a wholesome tendency, even when contrary to the strict letter of the law.

c. Its sense of justice may be in the vanguard of progress.

(1) This was the case with the workmen's compensation act.

C. The jury is not responsible for a large portion of the evils charged to it.

1. It is not responsible for delays, but may be more expeditious than judges.

a. It is not responsible for the loss of time in impaneling.
   (1) The lawyers are responsible for misuse of the privilege of challenging.
      (a) Their aim is to get a "picked" jury, or one favorable to their side.
      (b) It is a question whether the jury finally chosen is any better than the first men challenged.

b. It is not responsible for other delays, crowded dockets, appeals, new trials, reversals, immunities, etc.
   (1) It is the fault of judges and lawyers that these are tolerated.
      (a) The aim is often to cause delays purposely for the benefit of their side.
      (b) The jury has nothing to do with delays before trying cases, and delays before final sentence.
   (2) Appeals, new trials, etc. are often based on technicalities which are carried to absurd lengths.
      (a) They may be due to error of the judge.
      (b) They may have no connection whatever with the verdict and cannot reasonably be charged to the jury.

c. The jury is not responsible for ob-

jections to testimony that slow up the trial.

(1) Under a just juridical system the judge should be able to limit these.

d. The jury renders its decision with reasonable promptness after the trial.

(1) The judge may delay his decision for months and even for years.

III. No effective substitute exists for the jury, and it should be improved, not discarded.

A. A tribunal of one or more judges, without the jury, is undesirable.

1. It is always within possibility that the judiciary may abuse its power.

a. A judge may be open to political influence.

(1) Dictation by a boss.

(2) Under obligation to the political party responsible for his election to the bench.

(3) He may consider himself obligated to uphold a reactionary government.

b. He may be moved by natural human impulses of prejudice and bias, caste and class, social ambition for himself and family.

c. He may in some cases be open to bribery.

d. He may be misguided even though well-intentioned.

e. Human nature is not able to shoulder

such responsibility without ultimate abuse by some members of the class.

2. The judiciary may be inefficient.
   a. Judges may be selected without any merit or fitness for their position.
      (1) This is peculiarly the case when they are subject to political selection.
3. Judges tend to develop a legalistic type of mind rather than one open to considerations of moral, social, and intrinsic right.
   a. The more learned they are, the more they tend to govern by precedent, and technical concepts and formulae.
      (1) It is necessary for the legislatures to constantly pass laws attempting to counteract this.
      (2) The letter of the law obscurs the right.
         (a) They cannot so readily depart from the letter as juries.
         (b) Legal principles cannot be defined to cover individual cases.
   b. They become crystallized, case-hardened and conservative rather than constructive.
   c. They tend to draw farther apart from the common life.
4. Judges are as prone as juries to make errors.
   a. Judges make hundreds of mistakes in deciding law.
      (1) Courts, and even appellate courts, are full of errors of judgment and overruled cases.

b. They are just as likely as juries to disagree upon questions of fact.
c. The judge does not have the jury's advantage of balancing different points of view and different concepts of justice.

5. The fact that the judge's position is relatively permanent makes undue power the more dangerous.

B. The jury system should be reformed and not discarded.

1. The quality and selection of jurors can be improved.
   a. No one should be placed on panels except those qualified to serve.
   a. Exemptions can and should be materially cut.
      (1) All but those responsible for public safety and health, and in certain technical positions should be required to serve.
      (2) Challenges could, with benefit, be substantially reduced.
   c. Jury service should be popularized.
      (1) It should be made to appear a civic obligation for the best classes.
      (2) The term of service should be strictly limited to two or three weeks, and should be fairly distributed so that service is required only at long intervals; it should also be permitted at periods most convenient.
      (3) The juror should be given every reasonable freedom when not actually considering a case,

and every reasonable comfort and consideration.

2. The remaining parts of the administration of law should be improved.
   a. Procedure should be liberalized.
      (1) The sole object should be to establish truth.
   b. The standard of the court should be improved.
      (1) None but competent judges should be allowed to serve.
      (2) Power should be restored to the judges to really conduct cases under their charge.
      (3) The ethics of the legal profession should be raised.
      (4) The jury will reflect the increased dignity of the court and bench.
   c. Technical reversals should be done away with.
3. It is best left to the evolutionary process whether we should ultimately discard or should retain the jury.
   a. The people would not now consent to its discard in criminal cases.
   b. It will improve as public morality improves.
   c. It is sufficient to give the option of non-jury trial to those who prefer it.

BIBLIOGRAPHY

An asterisk (*) preceding a reference indicates that the article or a part of it has been reprinted in this volume. Abbreviations (GJ) (FJ) (AJ) and (GU) (FU) (AU) following references further classify some of the material on the subject of judges (J) and the unanimous verdict (U).

Bibliographies

United States. Library of Congress. List of recent references on the jury system. 5p. typw. Wash., D.C. Mr. 3, '23.

General References

Books, Pamphlets and Documents

Abbott, Austin. Brief for the trial of civil issues before a jury. 1135p. Lawyers Co-operative Publishing Co. Rochester, N.Y. '22.

Alger, George W. Citizen and the jury. *In* his Moral overstrain. p. 137-57. Houghton, Mifflin & Co., Bost. '06.

American Bar Association. Report, 1907: 444-62. Influence of national character and historical environment on the development of the common law. James Bryce.

American Bar Association. Report, 1923: 509-21. Great American jury. Martin J. Wade.

American Bar Association. Report, 1924: 181-90, 607-18. Securing a model of criminal procedure. George E. Alter; Judicial authority in the trial court. Louis B. Ewbank. (AJ)

American Bar Association. Report, 1925: 768-78. Courts and judges. Maurice H. Donahue. (FJ)

Askew, John Bertram. Jury system. *In* his Pros and cons. p. 135-6. E. P. Dutton & Co. N.Y. '11.

Beman, Lamar T. Election vs. appointment of judges. Reference shelf. Vol. 4, no. 2. 171p. H. W. Wilson Co. N.Y. '26 (GJ)

Bigelow, Melville M. Old jury. *In* his Papers on the legal history of government. p. 152-85. Little, Brown & Co. Bost. '20.

Brookings, W. DuBois and Ringwalt, Ralph Curtis. Jury system. *In* their Briefs for debate. p. 55-7. Longmans, Green & Co. N.Y. '23.

Bruce, Andrew Alexander. American judge. 218p. Macmillan Co. N.Y. '24. (GJ)

Callender, Clarence N. Selection of jurors. 107p. Univ. of Pennsylvania. Phila. '24.
Bibliography. p. 104-7.

*Chicago. Municipal Reference Library. Notes on laws of states fixing the number of jurors necessary to render a verdict in jury trials. 7p. typw. Frederick Rex, comp. '27.

Emery, Lucilius A. Concerning justice. 170p. Yale Univ. Press. New Haven. '14.

Encyclopaedia Britannica. Jury. Vol. 15, p. 587-93. 11th ed. '11.

Forsyth, William. History of trial by jury. 388p. James Cockcroft & Co. N.Y. '75. (GU)
Requirement of unanimity in the jury. p. 197-215.

Gibson, Lawrence M. Should we abolish trial by jury? *In* his Handbook for literary and debating societies. p. 215-17. Hodder and Stoughton. Lond. '13(?)

Hill, Mabel. Legal forms and jury trials. *In* her Liberty documents. p. 49-65. Longmans, Green & Co. N.Y. '12.

Kirby, James P., comp. Selected articles on criminal justice. 314p. H. W. Wilson Co. N.Y. '26.
Juries. p. 201-23.

Marks, Jacob. Reflections of a trial judge. 20p. Author. Municipal Court. N.Y.

Address delivered at the Bar of the association of the city of New York on October 18, 1923.

Matson, Henry. Jury. *In* his References for literary workers p. 158-60. A. C. McClurg & Co. Chic. '99.

Bibliography. p. 159-60.

Moschzisker, Robert von. Trial by jury. 452p. George T. Bisel Co. Phila. '22.

Nichols, Egbert Ray, ed. Three-fourths decision in jury trials. *In* his Intercollegiate debates. Vol. 3, p. 313-37. Hinds, Noble and Eldredge. N.Y. '12. (GU)

Debate between William and Vasti College and Monmouth College. Bibliography. p. 337.

Phillpotts, Eden. Jury: a novel. 249p. Hutchinson & Co., Ltd. Lond. '27.

Roe, Gilbert E. Our judicial oligarchy. 239p. B. W. Huebsch. N.Y. '12.

Shurter, Edwin DuBois and Taylor, Carl Cleveland. Resolved, that the jury system should be abolished in the United States. *In* Both sides of 100 public questions briefly debated. p. 30-1. Hinds, Noble and Eldredge. N.Y. '13.

Sutliffe, Robert Stewart. Impressions of an average juryman. 114p. Herbert H. Foster. N.Y. '22.

Train, Arthur. Jury. *In* his Prisoner at the bar. p. 205-23. Charles Scribner's Sons. N.Y. '06.

Turney, Raymond O. Court-room psychology: a work on jury trials. 159p. Times-Mirror Press. Los Angeles. '24.

Wellman, Francis L. Gentlemen of the jury: reminiscences of thirty years at the bar. 298p. Macmillan. N.Y. '24.

Wilcox, Henry S. Foibles of the bench. 144p. Legal Literature Co. Chic. '06. (GJ)

Wilcox, Henry S. Frailties of the jury. Legal Literature Co. Chic. '07.

Periodicals

Academy of Political Science. Proceedings. 1:620-4, 667-75. Jl. '11. Needed changes in criminal procedure. William Howard Taft; Criminal law reform in England and in the United States. Edwin R. Keedy.

Academy of Political Science. Proceedings. 10:396-406, 495-500. Jl. '23. Reform of criminal procedure. Herbert S. Hadley; Proposal to reduce the number of jury trials. Bertha Rembaugh.

American Bar Association. Journal. 11:792-7. D. '25. Woman and jury service. Elizabeth M. Sheridan.

American Bar Association. Journal. 13:715-20. D. '27. New development in jury trial. Leon Green.

American Institute of Criminal Law and Criminology. Journal. 1:531-5, 630-1. N. '10. Reform in the methods of selecting juries. J. W. Garner; Suggestions for the improvement of the jury system. J. W. G.

American Institute of Criminal Law and Criminology. Journal. 3:830-3. Mr. '13. Stoppato on jury service. John Lisle.

American Institute of Criminal Law and Criminology. Journal. 4:106-10. My. '13. Competency of jurors in insanity cases.

American Institute of Criminal Law and Criminology. Journal. 4:284-5. Jl. '13. Selecting jurors. W. H. McHenry.

American Institute of Criminal Law and Criminology. Journal. 10:90-9. My. '19. Human element in justice. George Everson. (GJ)

American Institute of Criminal Law and Criminology. Journal. 13:298-300. Ag. '22. Question of the unanimous jury. Walter A. Knight. (AU)

American Judicature Society. Journal. 4:77-82. O. '20. Grand jury reform.

American Judicature Society. Journal. 5:133-41. F. '22. Our failure of criminal justice.

American Judicature Society. Journal. 9:71-3. O. '25. Where jury trial fails.

American Judicature Society. Journal. 10:165-71; 11:20-8. Ap., Je. '27. Problem of trying issues. E. R. Sunderland.

Same. Texas Law Review. 5:no. 1. D. '26.

American Law Review. 17:398-410. My. '83. Trial by jury. Matthew P. Deady. (AU)

American Law Review. 39:398-409. My. '05. Jury system—its administration. Clement Manley.

American Law Review. 47:67-89. Ja. '13. Jury system under changing social conditions. John Wurts.

American Law Review. 52:823-58. N. '18. Trial by jury as affected by a bill in Congress, seeking to change practice in federal courts.

American Law Review. 54:750-9. S. '20. Historical sketch of trial by jury. Charles T. Coleman.

Same. Canadian Law Times. 40:732-42. S. '20.

American Law Review. 56:801-25. N. '22. Duty of disclosure. Sherman L. Whipple.

American Law Review. 57:906-8. D. '23. Trial by jury. Cornelius Doremus.

American Law Review. 58:24-44. F. '24. Magna Charta and trial by jury. Walter Clark.

Same. North Carolina Law Review. 2:1-13. D. '23; *Same.* Law Times. 159:78-81. Ja. 24, '25.

American Law Review. 59:481-501. Jl. '25. Improvement of administration of criminal justice by exercise of judicial power. Marcus A. Kavanagh.

American Law Review. 60:140-9. Ja. '26. Murder trials in England. A. Moresby White.

American Law Review. 60:321-37. My. '26. Why justice limps in pursuing crime. George B. Rose. (AU)

American Magazine. 87:16-17. F. '19. How I pick out men for a jury. John B. Stanchfield.

American Magazine. 92:32-3. O. '21. My thirty-eight years of experience with jurymen. Frederick O'Byrne.

American Mercury. 1:161-4. F. '24. Editorial. H. L. Mencken. (AJ)

American Mercury. 5:142-6. Je. '25. Grand inquest of the county. H. Rob Keebles.

The grand jury.

American Philosophical Society. Proceedings. 53:307-22. Ap. 23, '14. Some observations on the psychology of jurors and juries. Patterson DuBois.

American Political Science Association. Proceedings. 4:240-5. '07. Problems of jury trial. James E. Babb.

American Political Science Review. 10:572-3. Ag. '16. Reforms in trial by jury.

American Review. 4:139-56. Mr. '26. Ministry of justice and the problem of crime. Sheldon Glueck.

*Annals of the American Academy. 125:98-102, 106-12, 119-25. My. '26. Plan to relieve the congestion in our criminal courts. Moses H. Grossman (FJ); Jury trials in criminal cases. Clarence N. Callender; Prevention and punishment of modern crime. Edwin O. Lewis.

Atlantic Monthly. 48:9-18. Jl. '81. Trial by jury in civil suits. John C. Dodge.

Atlantic Monthly. 76:258-62. Ag. '95. Wrongs of the juryman. Harvey N. Shepard. (FU)

Bench and Bar. 22:13-18. Jl. '10. Suggestions for the improvement of the jury service. Henry M. Earle.

Bibliotheca Sacra. 63:669-72. O. '06. Trial by jury. Charles William Super.

Bradstreet's. 52:685. O. 25, '24. Jury trial in labor contempt cases.

California Commonwealth Club. Transactions. 3:429-501. D. '08. Reform in criminal procedure.

California Commonwealth Club. Transactions. 8:17. F. '13. Three-fourths jury. A. P. Black. (AU)

California Commonwealth Club. Transactions. 15:385-424. D. '20. Selection of jurors.

California Law Review. 11:1-11. N. '22. Misconceptions of insanity in jury trials. E. N. Williams.

Canadian Bar Review. 2:203-4. Mr. '24. Resolution of Canadian Bar Association, 1923, re bringing in verdicts of ten out of twelve jurors in capital punishment cases after lapse of three hours. (AU)

Case and Comment. 17:589-618. My. '11. Jury number. John M. Steele and others. (GU)

Abstracts. American Institute of Criminal Law and Criminology. Journal. 2:295-7. Jl. '11.

Central Law Journal. 75:404-7. N. 29, '12. Has the conception of trial by jury anything to do with the delays and uncertainties in the administration of justice? G. E. Price.

Central Law Journal. 88:221-2. S. 26, '19. Shall the jury be abolished in civil cases? W. J. Fitzgerald.

Century. 26:299-304. Je. '83. Both sides of the jury question. (GU)

Century. 86:711-16. S. '13. Mind of the juryman. Hugo Münsterberg.

Collier's. 76:23. D. 26, '25. Ladies of the jury. Hugh O'Connor.

Same. Literary Digest. 88:60-2. Mr. 6, '26.

Collier's. 79:19. My. 28, '27. Double-crossing the bar; jury duty as Uncle Henry sees it.

Columbia Law Review. 1:286-97. My. '01. Trials of jury trials. Alfred C. Coxe.

Columbia Law Review. 6:423-48. Je. '06. Jury trial and the federal Constitution. William Cullen Dennis.

Contemporary Review. 104:210-15. Ag. '13. Jury system. Ellis W. Davis.

Delineator. 100:2. My. '22. Have you done your jury duty yet? Louise Bullock.

Eclectic Magazine. n.s. 62:323-30. S. '95. Origin and growth of trial by jury in England. J. E. R. Stephens.

English Review. 10:625-33. Mr. '12. Grand jury—in two panels and a frame. J. Galsworthy.

Forum. 9:309-22. My. '90. Jury verdicts by majority vote. Sigmund Zeisler. (AU)

Green Bag. 14:239-46. My. '02. Development of trial by jury. E. C. Lawrence.

Green Bag. 16:514-19. Ag. '04. Modifications of the jury system. John Burton Phillips. (AU)

Green Bag. 17:623-6. N. '05. Administration of the jury system. Henry B. Brown. (AU)

Green Bag. 26:213-17. My. '14. Jury reform in civil cases. Thomas M. Henry. (AU)

*Harper's Monthly Magazine. 155:750-8. N. '27. Great American game; our sporting theory of criminal justice. Rollin M. Perkins.

Harper's Weekly. 49:158, 160. F. 4, '05. My friend, the juryman. Josiah Flynt.

Harper's Weekly. 49:1005. Jl. 15, '05. Secretary Taft on trial by jury.

Harper's Weekly. 51:268. F. 23, '07. Perplexities and humors of selecting a jury. Frederick B. House.

Harper's Weekly. 55:9-10. S. 30, '11. Grand juror. Churchill Williams.

Harvard Law Review. 29:395-403. F. '16. Legislative indictment of the courts. J. B. Winslow.

Harvard Law Review. 31:669-91. Mr. '18. Trial by jury and the reform of civil procedure. Austin Wakeman Scott.

Harvard Law Review. 39:917-1019. Je. '26. Petty federal offenses and the constitutional guaranty of trial by jury. Felix Frankfurter, Thomas G. Corcoran.

Illinois Law Review. 20:106-7. My. '25. First aid for trial by jury. John H. Wigmore.

Same. American Judicature Society. Journal. 9:121-2. D. '25.

Juridical Review. 36:254-72. S. '24. Learned and unlearned reason. Carleton Kemp Allen.

Justice of the Peace. 81:422-4. N. 17, '17. Juries—their rights and functions.

Kentucky Law Journal. 6:182-3. F. '18. Reformation of the jury system. Lewis McQuown.

Ladies' Home Journal. 44:39. My. '27. What price crime? Alice Ames Winter.

Law Journal. 55:229-33. Je. 19, '20. Trial by jury: a symposium.

Law Magazine and Review. 31:1-24, 184-204, 289-315, 451-65; 32:72-87. N. '05; F., My., Ag., N. '06. Province of the judge and of the jury. G. Glover Alexander.

Law Notes. 19:64. Jl. '15. Majority verdicts. (AU)

Law Notes. 23:126-8. O. '19. Undermining the right to jury trial.

Law Notes. 25:187-90. Ja. '22. Shall the grand jury be abolished? Minor Bronaugh.

Same. American Law Review. 56:116-27. Ja. '22

Law Notes. 26:224. Mr. '23. Three quarters verdict in criminal cases. (FU)

Law Notes. 28:122-3. O. '24. Jury of his peers.

Law Notes. 28:204-5. F. '25. Keeping the jury out. (FU)

Law Quarterly Review. 27:347-61. Jl. '11. Origin of the petty jury. Charles L. Wells.

Law Quarterly Review. 30:97-110. Ja. '14. Early opposition to the petty jury in criminal cases. Charles L. Wells.

Lawyer and Banker. 7:120-5. Ap. '14. Shall our jury system be reformed? B. Elder.

Literary Digest. 76:16. Mr. 3, '23. Judges reminded to be just. (GJ)

Literary Digest. 82:31-2. Jl. 26, '24. Weakness of American justice.

Literary Digest. 95:8-9. N. 26, '27. Public anger at the Fall-Sinclair mistrial.

McClures Magazine. 34:677-86. Ap. '10. Some follies in our criminal procedure. Charles B. Brewer.
Massachusetts Law Quarterly. 3:81-3. F. '18. Report of Special committee of majority verdicts. (GU)
Massachusetts Law Quarterly. 3:347-57. Ag. '18. Proposed act of Congress relative to the powers of federal judges in charging juries. G. F. W. Grinnell.
Massachusetts Law Quarterly. 6:111-12. My. '21. Layman's suggestions about jury duty. Robert L. Studley.
Massachusetts Law Quarterly. 8:31-6. F. '23. Current controversy about juries.
Massachusetts Law Quarterly. 10:26-30. My. '25. Minority juror and Judge Hoar's charge in Commonwealth v. Tuey. (GU)
Michigan Law Review. 13:302-16. F. '15. Inefficiency of the American jury. Edson R. Sutherland.
Michigan Law Review. 13:391-400. Mr. '15. Some needed reforms in the methods of selecting juries. Willis B. Perkins.
Michigan State Bar Journal. 3:97-110. F. '24. Less than unanimous verdicts—the case in their favor. Paul Howland; The case against them. Stewart Hanley (AU) (FU)
Monthly Labor Review. 19:1362-4. D. '24. Jury trials for contempt cases.
Municipal Bulletin (Civic League, Cleveland, O.). p. 1-13. Ja. '16. Jury system in Cuyahoga county.
Nation. 44:546. Je. 30, '87. Reform of our jury system.
Nation. 67:163. S. 1, '98. Perfection of jury trial.
Nation. 77:106. Ag. 6, '03. Jury to the rescue.
New Republic. 32:112-13. S. 27, '22. Criminal justice.
New Review. 1:459-63. Ap. 12, '13. Grand jury system. Frederick Haller.
New York Times. Sec. 7, p. 18. Jl. 24, '27. Our jury system again under fire. R. le Clerc Phillips.

North American Review. 187:856-9. Je. '08. Delays and defects in the enforcement of law in this country: the jury system. William H. Taft.

North American Review. 188:514-20. O. '08. Campaign and the Sherman law: jury clause of the Constitution. Edward L. Andrews.

North American Review. 191:49-63. Ja. '10. Criminal procedure in the United States. James W. Garner.

North American Review. 192:250-7. Ag. '10. American versus English courts. William N. Gemmill.

Ohio Law Bulletin. 60:253-4. Je. 7, '15. Verdicts by less than a unanimous vote approved elsewhere. (AU)

From London Law Journal.

Ohio Law Reporter. 10:251-8. Jl. 29, '12. Jury disagreements and the rule of nine. (GU)

Ohio Law Reporter. 10:284-90. Ag. 12, '12. Jury disagreements and the three-fourths rule. C. Sawyer. (GU)

Ohio Law Reporter. 10:345-6. Ag. 26, '12. Three-fourths verdict. J. A. Cline. (GU)

Oklahoma Law Journal. 14:35-6. S. '15. Unanimity in verdicts. (GU)

Same. Virgina Law Register. n.s. 1:224-5. Jl. '15.

Oregon Law Review. 1:177-83. Je. '22. On jury trial. James L. Coke.

Outlook. 83:601-5. Jl. 14, '06. Quest for error and the doing of justice. Charles F. Amidon.

Outlook. 99:794-5. D. 2, '11. Trial by jury on trial.

Outlook. 124:448. Mr. 10, '20. Impressions of a woman juror.

Outlook. 137:301. Je. 25, '24. Oyez! oyez!

Overland. n.s. 69:560-1. D. '16. Jury system. James E. Fenton.

Pittsburgh First. 7:1-2. F. 14, '25. Necessity for passage of jury reform bill. William S. Dalzell.

Police Journal. 13:6-8, 28-30. My.-Je. '25. Efficacy of the present judicial system as a method for the determination of innocence or guilt. John A. Larson and Merritt Y. Hughes.

Political Science Quarterly. 19:650-72. D. '04. Trial by jury in Germany. Burt Estes Howard.

Putnam's. 2:293-6. Je. '07. Legal defeaters of the law. Frederick Trevor Hill.

Saturday Evening Post. 198:12. D. 5, '25. Gentlemen of the jury. Frederick Orin Bartlett.

Saturday Evening Post. 200:45+. O. 8, '27. Watchdogs of crime. Kenneth L. Roberts.

Scribner's Magazine. 47:85-95. Ja. '10. Some difficulties of a juryman. Joseph Horner Coates.

Scribner's Magazine. 70:686-8. D. '21. In the name of the Commonwealth. Mary Eleanor Roberts.

*Scribner's Magazine. 79:94-6. Ja. '26. Juror's part in crime. Charles C. Mott, Jr.

Society of Comparative Legislation. Journal. 3rd ser. 4:210-17. N. '22. Trial by jury. M. M. Geike Cobb.

*Southwestern Political and Social Science Quarterly. 4:221-37. D. '23. Jury system of the southwest. Caleb Perry Patterson.

University of Colorado Studies. 2:209-19. Je. '05. Modifications of the jury system. (GU)

Reprint from Green Bag. 16:no. 8. Ag. '04.

University of Pennsylvania Law Review. 57:197-215. Ja. '09. Constitutional right to a trial by jury of the vicinage. Henry G. Connor.

University of Pennsylvania Law Review. 63:585-608. My. '15. Judicial administration. Ezra Ripley Thayer.

Same. Chicago Legal News. 47:351-2, 356, 358-60. Je. 5-12, '15.

University of Pennsylvania Law Review. 63:754-86. Je. '15. Critical survey of certain phases of trial procedure in criminal cases. Howard A. Lehman.

University of Pennsylvania Law Review. 70:1-13, 73-86, 159-71. N. '21; Ja.-Mr. '22. Historic origin of trial by jury. Robert von Moschzisker.

Unpartizan Review. 13:273-86. Mr. '20. Good men and true. Ralph Bergengren.

Virginia Law Register. n.s. 2:380-5. S. '16. Juries of less than twelve and verdicts by more than a majority of the jury in cases in state courts under federal statute. (GU)

Virginia Law Register. n.s. 7:933-7. Ap. '22. Worm turns: a rebuked juror answers the rebuking judge. *Same.* Chicago Legal News. 55:99-100. O. 19, '22.

Virginia Law Register. n.s. 8:956-9. Ap. '23. Jury system and menaces to a fair trial. J. C. Hutcheson.

Virginia Law Review. 3:275-95. Ja. '16. Is the common law relation of judge and jury subject to legislative change. Thomas W. Shelton.

Virginia Law Review. 6:77-86. N. '19. Origin and development of trial by jury. C. T. Coleman.

Westminster Review. 145:441-5. Ap. '96. Judges and juries. Harold Hodge.

Westminster Review. 177:414-17. Ap. '12. Jury system as a measure of truth. C. B. Mabon. (AU)

Wisconsin Law Review. 3:51-5. O. '24. Five-sixths verdict in trial by jury. E. W. Peck. (GU)

Woman Citizen. n.s. 4:1330. My. 29, '20. Unit rule in juries. Frederick A. Brown. (AU)

Woman Citizen. n.s. 9:19. S. 20, '24. Women as jurors. Mrs. F. Louis Slade.

Woman Citizen. n.s. 12:14-15. Jl. '27. Ladies of the jury. Eveline W. Brainerd.

Woman Citizen. n.s. 12:27. N. '27. Jury service in a Michigan city. Caroline Bartlett Crane.

World Today. 18:599-606. Je. '10. Delays of justice. Hugh C. Weir.

World's Work. 13:8221-6. N. '06. Shameful miscarriage of justice. Hubert Bruce Fuller.

World's Work. 27: 338-46. Ja. '14. Swift and cheap justice. George W. Alger.

References Favorable to Jury

Books, Pamphlets and Documents

American Bar Association. Report, 1905: 15-31. Jury system: with discussion. Harvey M. Shepard.

American Bar Association. Report, 1921: 591-5. Should verdicts be unanimous in criminal cases? James R. Clark. (FU)

Black, Jeremiah S. In defense of the right to trial by jury—ex-parte Milligan. *In* his Essays and speeches. p. 510-39. D. Appleton & Co. N.Y. '85.

Choate, Joseph H. Trial by jury. *In* his American addresses. p. 197-239. Century Co. N.Y. '11. (FU)
Also separate. 30p.

*Choate, Joseph H. Trial jury: letter regarding unanimous verdicts, submitted by A. C. Clearwater to the Constitutional convention of the state of New York, Albany. 22p. Je. 18, '15. (FU)

May, Charles S. Trial by jury. *In* Donovan, Joseph W. Modern jury trials. p. 165-90. G. A. Jennings Co., Inc. N.Y. '24 (AU)

North Carolina Bar Association. Report, 1922: 58-73. Use and abuse of the jury system. F. W. Thomas.

Ohio State Bar Association. Proceedings. 37: 167-75. '16. Jury system and its preservation. J. C. Hostetler.

Price, Eli Kirk. Discourse on trial by jury. 24p. Caxton Press of C. Sherman, Son & Co. Phila. '63. (FU)
Read before American Philosophical Society, May 1, 1863.

Train, Arthur. Sensationalism and jury trials. *In* his Courts, criminals and the Camorra. p. 53-64. Charles Scribner's Sons. N.Y. '12.

Universal Congress of Lawyers and Jurists. Report, 1904: 105-7. Jury. John F. Dillon.

PERIODICALS

American Bar Association. Journal. 7:677-8. D. '21. Statutory assaults on the jury system. F. W. Thomas.

*American Bar Association. Journal. 10:111-14. F. '24. Present day jury: a defense. Connor Hall. (AJ)

*American Federationist. 17:385-99. My. '10. Trial by judge and jury. Henry Clay Caldwell.

Same condensed. American Institute of Criminal Law and Criminology. Journal. 1:483-4. S. '10; *Same* separate. p. 6-16. American Federation of Labor. Wash., D.C.

*American Institute of Criminal Law and Criminology. Journal. 18:100-4. My. '27. Revolt of the jury. Louis M. Robinson.

American Law Review. 22:853-72. N. '88. American jury system. Henry C. Caldwell. (AU)

American Law Review. 43:612-22. Jl. '09. On abolishing requirements for unanimity in verdicts. Nelson Phillips. (FU)

*Annals of the American Academy. 36:175-84. Jl. '10. Jury system—defects and proposed remedies. Arthur C. Train. (AU)

Arena. 12:209-17. Ap. '95. Palladium of liberty. Victor Yarros.

Century Magazine. 27:471-3. Ja. '84. Our jury system. Eugene Lewis.

Commercial and Financial Chronicle. 119:1920-1. O. 25, '24. United States Supreme court rules that federal courts cannot deny jury trials in contempt cases in labor disputes.

Criminal Justice. p. 1-2. My. '27. Jury service in the municipal court. Francis D. Hanna.

Everybody's. 25:337-40. S. '11. Twelve good men and true. Arthur Train

Same condensed. American Institute of Criminal Law and Criminology. Journal. 2:782-5. Ja. '12.

Forum. 22:107-16. S. '96. Threatened annihilation of the judge-and-jury system. W. K. Townsend.

Illinois Law Review. 8:255-64. N. '13. Proposed bill to restore and protect the right of trial by jury, and a brief in support of the bill. Charles H. Robinson. (FU)

International Monthly. 5:1-9. Ja. '02. Jury. David J. Brewer. (AU)

International Review. 14:158-68. F. '83. Trial by jury. Christopher S. Patterson.

Kentucky Law Journal. 4:25-9. Mr. '16. Trial by jury. W. J. Kallbreier.

Law Notes. 26:183. Ja. '23. Functions and capacities of jurors.

Law Notes. 29:151-2. N. '25. Jury system? Yes. Lester P. Edge.

Marquette Law Review. 8:125-33. Ap. '24. Is trial by jury an ineffective survival? A. C. Umbreit.

Nation. 16:428-30. Je. 26, '73. Trial by jury.

Nation. 17:351-2. N. 27, '73. Lesson from the Tweed verdict.

North American Review. 135:447-60. N. '82. Advantages of the jury system. Dwight Foster. (AJ)

North American Review. 139:1-11. Jl. '84. Juries and jurymen. Robert C. Pitman.

Outlook. 75:329-30. O. 3, '03. Grand jury system. Clinton Rogers Woodruff.

Popular Science Monthly. 24:676-86. Mr. '84. Jury system. Henry H. Wilson. (GU)

Saturday Evening Post. 186:19, 65-8. Ap. 18, '14. Jury and the judges. Melville D. Post.

Stone and Webster Journal. 36:147-54. F. '25. Guilty or not guilty. L. S. Cowles.

Virginia Law Review. 2:493-506 Ap. '15. Defacing an ancient landmark—the return of an indictment. W. R. Staples.

Woman Citizen. n.s. 9:15. Ap. 18, '25. Forward, jury women. Florence E. Allen.

References Opposed to Jury

Books, Pamphlets and Documents

North Carolina Bar Association. Report. 1910: 11-52 Trial by jury of civil actions. John W. Hinsdale. (FJ) (AU)

Parsons, Philip A. Jury. *In* his Responsibility for crime. p. 110-21. Columbia Univ. Studies in history, economics and public law. Vol. 34, no. 3. N.Y. '04.

Universal Congress of Lawyers and Jurists. Report, 1904: 96-100. Jury. Alfred Nerinex.

Periodicals

American Bar Association. Journal. 10: 53-7. Ja. '24. Trial by jury: an ineffective survival. Bruce G. Sebille. (FJ)

Same. American Law Review. 59: 65-79. Ja. '25.

American Bar Association. Journal. 10: 520. Jl. '24. Jury and its successors. Alfred D. Preston. (FJ)

American Institute of Criminal Law and Criminology. Journal. 1: 959-62. Mr. '11. Trouble with the jury system. J. W. G. (AU)

American Institute of Criminal Law and Criminology. Journal. 2: 183-5. Jl. '11. Juries as judges of the law. J. W. Garner.

American Judicature Society. Journal. 8: 246. Je. '24. How about the jury? K. E. Leighton.

American Law Review. 20: 661-79. S. '86. Should trial by jury in civil cases be abolished? William L. Scott. (FJ)

American Law Review. 40: 222-39. Mr. '06. Jury system. S. M. Bruce. (FJ)

American Law Review. 42: 192-9. Mr. '08. Should trial by jury be abolished? Hal W. Greer.

Same condensed. Review of Reviews. 37: 607-8. My. '08.

*American Law Review. 57: 42-56. Ja. '23. Abolish the jury. J. C. McWhorter. (FJ)

Same. West Virginia Law Quarterly. 29: 97-108. Ja. '23.

*American Law Review. 60: 938-52. N. '26. Abolition of jury trial in civil cases. Rupert Bullivant.
Same. Oregon Law Review.

*American Mercury. 3: 403-10. D. '24. Trial by jury. Harry Elmer Barnes.
Excerpts. Current Opinion. 78: 334-5. Mr. '25. Our childish, barbaric jury system.

*Annals of the American Academy. 29: 606-12. My. '07. Crime and judicial inefficiency. James W. Garner. (AU)

Arena. 22: 312-19. S. '99. Where jury bribing begins. E. Parmalee Prentice.

Arena. 33: 510-13. My. '05. Is trial by jury, in criminal cases, a failure? F. J. Cabot.

Bench and Bar. n.s. 7: 97-102. Ja. '14. Some observations upon the unjustifiable criticism of our judges. Edgar M. Cullen.

*Canadian Bar Review. 2: 199-202. Mr. '24. What is wrong with the jury system. Arthur Harris McConnell.

Canadian Bar Review. 3: 140-1. Mr. '25. Magic in the jury box.

Case and Comment. 24: 807-9. Mr. '18. Thirteenth juror. Willis Barnes. (GJ)

Century. 25: 124-33. N. '82. Is the jury system a failure? Albert Stickney. (FU) (FJ)

Classical Journal. 17: 3-15. O. '21. Trial by jury in Athens and America. J. O. Lofberg. (FJ)

Cosmopolitan. 39: 384-8. Ag. '05. Jury in ancient America. Ambrose Bierce.

Docket. 3: 2762, 2765. Ap. '24. Juries jeopardizing justice. E. C. Hall.
Same. Chicago Legal News. 56: 405. Jl. 10, '24.

Everybody's. 25: 330-7. S. '11. Twelve good men and true. Charles Somerville.

Forum. 3: 102-10. Mr. '87. Shall the jury system be retained? Edward A. Thomas.

Gentleman's Magazine. 286:189-99. F. '99. Trial by jury in civil cases. J. E. R. Stephens. (FJ)

Green Bag. 26:203-12. My. '14. Jury system in civil cases the greatest drag in delaying justice. William H. Blymyer. (FJ)

International. 8:98-100. Mr. '14. Farce of trial by jury. Harry David Kerr.

Kentucky Law Journal. 11:33-6. N. '22. Practical operation of the jury system. S. D. Rouse.

Law Quarterly Review. 17:171-8. Ap. '01. Trial by jury as *nisi prius*. S. L. Holland.

Law Times. 157:307-8. Ap. 12, '24. Obsolescence of the jury in criminal cases. A. L. (FJ)

Lippincott's. 9:335-40. Mr. '72. Trial by jury. Albert S. Bolles.

Literary Digest. 76:50. Mr. 17, '23. How a mixed jury passed an all-night session. (AU)

Same condensed. Massachusetts Law Review. 8:48-50. F. '23. Story of a mixed jury in Pennsylvania.

Munsey. 29:723-6. Ag. '03. Can the jury system be improved? Tudor Jenks.

Nation. 37:90-1. Ag. 2, '83. Delusions as to jury trial.

Nation. 88:111-12. F. 4, '09. Judicial excrescence. Herbert L. Baker.

Nation. 124:9-10. Ja. 5, '27. Twelve good men and true. Paul Y. Anderson.

National Corporation Reporter. 51:216. S. 16, '15. Unanimity in verdicts. (AU)

North American Review. 134:244-58. F. '82. Trial by jury. Edward A. Thomas.

North American Review. 139:348-55. O. '84. Shall the jury system be abolished? Robert Y. Hayne. (FJ)

*Outlook. 101:647-8. Jl. 20, '12. Jury service. Spectator.

Outlook. 132:376-8. N. 1, '22. Crime wave and the jury. Imogen B. Oakley.

Popular Science Monthly. 26: 289-98. Ja. '85. Glance at the jury system. C. H. Stephens.

Popular Science Monthly. 47: 375-82. Jl. '95. Medical study of the jury system. T. D. Crothers.

*Public. 22: 957-9. S. 6, '19. Substitute for jury trials in civil cases. Percy Werner.

Same. Ohio Law Bulletin. 64: 351-3. S. 22, '19; *Same.* Virginia Law Register. n.s. 5: 490-3. O. '19.

Public. 22: 980-2. S. 13, '19. Jury trials versus voluntary tribunals. Percy Werner.

Saturday Evening Post. 198: 30. Mr. 13, '26. Jury-dodger.

University of Illinois Bulletin. 7: 1-15. N. 7, '09. Should the jury be judges of the law in criminal cases? Oliver A. Harker.

Unpartizan Review. 13: 287-307. Mr. '20. Men not so good and not so true. Samuel R. Stern; Case against jury trials in civil actions. Lawrence Irwell.

Westminster Review. 97: 139-55. Ap. '72. Trial by judge, and trial by jury. (FJ)

Westminster Review. 172: 50-60, 147-51. Jl.-Ag. '09. Demoralisation of the law. Ignotus.

Westminster Review. 175: 504-16. My. '11. Some tendencies of our legalism. Anglo-Indian.

Yale Law Journal. 24: 265-73. F. '15. Government by jury. Lucilius A. Emery.

Same. Michigan Law Review. 8: 57-66. Ja. '15.

GENERAL DISCUSSION

JURY SYSTEM[1]

What is meant by trial by jury?

At a time when a scientific and sympathetic attempt is being made by leading men in the legal profession and by students of civil government to reorganize state and federal courts and to simplify their procedure, it is necessary to answer the above question in order to know to what extent efforts at reform are blocked by the guarantee of trial by jury found in the state and federal constitutions.

It is clear from history that the concept of trial by jury has been a constantly changing one. Its origin is controversial, being found by some scholars in the practice of the Greeks and Romans, by others in the institutions of the Teutonic colonists of the Roman Empire, while still others declare that the institution is indigenous to the soil of Britain. Professor Haskins of Harvard University maintains that the jury is essentially Norman French in its beginnings and was used in Normandy by the father of Henry II. Professor Thayer says, "Things indicate the breaking up and confusing of older forms: anomalies and mixed methods present themselves. The separate nations of the complaint secta, the fellow-swearers, the business witnesses, the community witnesses, and the jurors of the inquisition and the assize run together."

If nineteen places could wage war over the birth place of Homer, it is not strange that a similar contest has

[1] From article "Jury System of the Southwest," by Caleb Perry Patterson, University of Texas. *Southwestern Political and Social Science Quarterly.* 4: 221-37. December, 1923.

resulted over the indigeneity of the most venerated institution of modern jurisprudence. The evidence is so conflicting that history cannot point out the nativity of this institution, but is forced more or less to evade the question by concluding that the constituent elements of trial by jury are thoroughly cosmopolitan, with special emphasis placed on the English contribution to the institution as it is now known among English speaking peoples. "To suppose," said Edmund Burke, "that jurors are something innate in the constitution of Great Britain, that they have jumped, like Minerva, out of the head of Jove in complete armor, is a weak fancy, supported neither by precedent nor by reason."

Here, then, is indubitable evidence that this institution has been in a state of constant flux. It has traversed a long road from the Norman inquisition, the assize of Henry II, or the institution much lauded by Lord Coke.

When the jury was in its inquisitional stage it merely furnished information to an officer of the court. The inquisitors were expected to know about community affairs and were disqualified for service if they did not as contrasted with our present jurors who are challenged unless they are ignorant of the facts of which they are the judges. Here is a complete change in the community element in this institution.

In the thirteenth century it appeared that it was not proper for the same jurors who found the bill of indictment to act also as a jury to try the accused for their own indictment. It was obvious that the jurors would likely maintain in the second instance what they had sworn to in the first. An indictment sworn to on a basis of common rumor might be entirely incorrect in fact. It was seen that there were two distinct functions here and that there were needed, therefore, two juries. This evolution ended in the establishment of the trial jury as a separate institution from what we now call the grand jury, which possesses more nearly the characteristics of

the old inquisition than the modern petit jury which is English in origin, functionally speaking.

One of the fundamental changes in the development of trial by jury was the growth of a distinction between law and fact. In all the older courts in England it was customary for the jury to declare what the custom was. The judge during this period was a mere presiding officer. He was only a moderator or an umpire. At a still later date after the judge had begun to declare the law, there existed in England special custom which only the jury could pronounce. The juries under the reign of Henry II seemed to have confined themselves to judging of the facts; however, it is not to be inferred that there was a basis of such nicety of distinction as exists today. Of course, this line of demarcation is still in process of formation. What is a fact is a much mooted question in courts at the present time. This line is a very important one because it determines the role of action of the judge as well as the jury in our modern common law procedure.

It was also characteristic of the early jury that it was used in matters that were not strictly judicial in character. It was means of securing from representative citizens information of any kind that the king needed. It might be concerning economic, religious, or political affairs. In fact in Plantagenet England, it was used merely incidentally in the administration of justice and primarily as a very valuable adjunct of the exchequer to exact fees from His Majesty's subjects.

It is also worthy of note that the modern grand jury is used only in criminal matters. That is the old inquisitional function of the jury that was used to secure information concerning both civil and criminal matters is now restricted exclusively to criminal jurisdiction.

The above citations are sufficient to establish the thesis that trial by jury has been a constantly changing institution. It has changed its purpose, its methods, and

its functions. From being an instrument of the king, it has become an ally of democracy. From being a means of exploiting the individual, it has become the protector of individual rights. It is evident from the previous discussion that trial by jury is a rather indefinite phrase, unless it is identified with some particular period of its evolution.

It is interesting to note that at the time of adopting the federal Constitution there was no definite conception of trial by jury in the United States, and that this fact prevented the federal convention from adopting any particular system of trial by jury to be used by the federal courts. In fact, trial by jury in civil cases was not provided for in the Constitution. Hamilton, having made a brief review of the differences in the practices of the various states, says:

> From this sketch it appears that there is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several states: and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the states: and secondly, that more or at least as much might have been hazarded by taking the system of any one state for a standard, as by omitting a provision altogether and leaving the matter, as has been done to legislative regulation.

In the federal and territorial courts, the right of trial by jury in civil cases is guaranteed by the Seventh Amendment which states that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." Since the first ten amendments apply only to the national government, the above guarantee does not apply to the trial of civil cases in the states.

The Constitution does not define what it meant by trial by jury, and, since the states differed in their con-

ception and practice of it, the federal courts chose to follow the common law of England rather than the practice of any particular state.

It should be pointed out in this connection that while the incidents of trial by jury in England in 1790 were adopted, yet it does not follow that they were to become unalterable. What may be regarded as fundamentally a part of trial by jury? "It is a question of substance," says, Scott, "and not of form."

The jury in American state courts plays a larger part than in either American federal courts or English courts. At the time America was being settled, the English judges under the control of the Stuart dynasty were coercing English juries and oppressing the people. The jury came to be regarded as the bulwark of liberty. This enthusiasm followed the jury to the New World and has been a persistent influence in judicial administration in the American states. After the Revolution of 1688 and the act of settlement of 1700, which provided that judges should hold office for life or during good behavior rather than at the pleasure of the king, public opinion reacted in favor of the judge in England, who is now the strongest judge in the world. The place of the jury in the American state judiciaries is just about what it was in England during the reign of the Stuarts.

JURY TRIALS IN CRIMINAL CASES[2]

In a discussion of trial by jury in criminal cases, it is necessary to keep constantly in mind the fact that the jury is only one of the incidents in our system of criminal procedure, and that the correction of whatever defects may attach to it is only a part of the larger problem of obtaining a prompt, orderly and efficient

[2] By Clarence N. Callender, of the Philadelphia Bar; professor of business law, Wharton School, University of Pennsylvania. *Annals of the American Academy.* 125: 106-12. May, 1926.

method of bringing the guilty to final judgment. No matter what improvements we may bring into the jury system, criminal justice will still be found wanting unless we revise our criminal code, abolish or improve the minor judiciary, remodel the grand jury system, and correct the many other defects in procedure which tend to delay and impede the progress of criminal trials. Nevertheless, the jury does play a very important part in the criminal courts. Unless it functions smoothly, the whole procedural machinery is thrown out of gear. If juries disagree when the evidence is sufficient to justify conviction, the prosecution is seriously hampered. If they refuse to convict, all other efforts are rendered abortive.

There are many phases of the jury problem which might be discussed. Some writers would raise the question of whether it would not be better to abolish jury trials altogether and resort to other alternative methods of determining facts. But this presents an issue of only academic interest. It is very unlikely that the jury will be deliberately abolished. Certainly there is no movement on foot to do this at the present time, and the jury is well intrenched in constitutional provisions. If the jury system is to disappear, it doubtless will be through an evolutionary process whereby its authority will be gradually taken away and lodged in the judge, or its importance lessened by means of the substitution of other methods of trial. There is already a noticeable tendency in civil disputes to substitute commercial arbitration. Also, the practice of voluntarily waiving jury trials, in cases tried in court, is definitely on the increase. In England and Canada this process has gone a long way, and the number of jury trials has been greatly reduced in recent years by arbitration, by the waiving of jury trials, and by giving the judges in civil suits power to grant or refuse such trials at their discretion. In the United States commercial arbitration

is in its infancy; the practice of waiving jury trials, while increasing, is not in general use; and nowhere do judges possess the authority to allow or refuse jury trials where the parties demand them. In the criminal courts the jury is even more firmly established. Except in the summary trials of trivial offenses before justices of the peace, a jury is almost universally used. A few states have laws permitting the accused to waive a jury trial, but the practice of putting him to an election is not commonly followed. On the contrary, we virtually force him to take a jury trial by giving him no opportunity to make a choice. A notable exception is Maryland where, by constitutional provision, a jury trial may be waived in criminal as well as in civil cases. The courts have taken advantage of this provision and, as a result, trials before judges have become quite common, especially in cases involving the less serious offenses.

Such a scheme is worthy of very serious consideration. Why should we not discourage as much as possible a resort to the jury trial? If a considerable percentage of defendants are willing to be tried by the judge, why force them to take jury trials? It would be much better to compel each one to demand it. In many states it is now possible to allow defendants to waive jury trials; in others—statutory or constitutional changes would doubtless be required. The saving in time and money which would result would probably be enormous, and if an ultimate resort to the jury were reserved to all defendants, the danger of arbitrary action upon the part of judges would be sufficiently guarded against.

This brings us to a consideration of the jury trial itself. What is the matter with it? Has it such inherent weakness that it cannot be made to function satisfactorily? What should be done to improve it?

The jury system is not inherently defective as an instrumentality for determining facts in litigation. On the

contrary, it is, or may be made, a very satisfactory means of resolving such issues as arise in the criminal courts, where the matters for elucidation are human actions and human motives. The trouble with the jury system is that it has been allowed to degenerate. Abuses of its true functions and faults in its administration have crept in, and little or nothing has been done to remedy them. We have been content to regard it as the great "palladium of liberty" and, consequently, as beyond reproach and not susceptible of improvement. But of late it has fallen into disrepute, and the question is being asked—what should be done about it?

Among the causes for the decline in the prestige of the jury have been defects in criminal procedure over which the jury itself has had no control whatever. An example is the interpretation placed upon the constitutional guarantee that a person shall not be compelled to testify against himself in a criminal proceeding. This provision has been construed by the courts to mean that failure of the accused to testify in his own behalf shall not be made the basis of any adverse comment by the court or by the prosecuting attorneys. More than that, the judge is required to instruct the jury that they are not permitted to draw any conclusions or infer any guilt from the fact that the defendant has not taken the stand in his own behalf. One may be permitted to doubt whether the guarantee itself, formulated in the days of oppression, is still justifiable. Its by-product is the third degree. At any rate, the construction placed upon it is absurd. Certainly, the silence of the accused should not, in itself, be sufficient to justify conviction if unaccompanied by other evidence sufficient to convict, but if so accompanied, it ought to be considered a highly relevant fact. Innocent men need no such protection. The effect of such instructions of the court on the jury tends to make them more reluctant to use against the

defendant the intelligence which they brought into the jury box.

Another reason for the deterioration of trial by jury has come about as a result of the tendency in the United States to reduce the responsibility of the judge in the conduct of the trial and to place on the jury a burden greater than it is qualified to assume. We have almost reduced the judge to the rôle of an umpire between contending factions, and permitted or compelled him to throw most of the responsibility onto the jury. The jury, being unfamiliar with the devious ways of criminal procedure, and being denied the effective assistance of the judge, flounders about, and all too often follows the path of least resistance—and acquits.

One of the influences which tends to reduce the usefulness of the judge results from the constititutional guarantee that a person shall not twice be placed in jeopardy of life and limb for the same offense. This provision, by strict construction, applies only to felonies, but the courts generally have been guided by the spirit rather than the letter of the law, and have applied the doctrine to all indictable offenses. This means that the state is denied the right to an appeal from an acquittal. As a consequence, the judge, unless he is possessed of a high degree of legal learning and also of moral courage will rule against the prosecution on all doubtful points, for thereby he does not subject himself to a reversal by the appellate court. If he rules against the defendant, he is subject to review. Even the learned and conscientious judge is restained by the thought that if the defendant succeeds in getting many exceptions on the record, an appeal is sure to result—if only for the purpose of delay. The effect of all this is fairly obvious. It means that everything favorable to the accused is placed before the jury, but frequently the telling points of the state's case are rejected, and the district attorney has no remedy. In some states the

judge is not even allowed to review the facts of the case in his charge to the jury, but is confined to charging them on points of law prepared by opposing counsel. In other states the fundamental theory of jury trials has been abandoned and the juries have been made the judges of the law as well as of the facts. That the tendency to deny to judges an effective part in the trial of cases is not dead is evidenced by the fact that there was recently an attempt made in Congress to pass a law forbidding a federal judge to "express his opinion as to the credibility of witnesses or the weight of the evidence." Fortunately, the bill was defeated, and the more enlightened procedure of the federal courts was preserved.

Juries were never intended to operate virtually as independent agencies. Their true function is to decide simple issues under the direction and guidance of the court. If we deny to them that assistance, the result is bound to be disastrous. They know human nature; they can detect falsehood; they can understand the motives that actuate their fellowmen, but in the unfamiliar atmosphere of the courtroom they need the guidance of a disinterested judge. His riper experience derived from daily contact with witnesses would enable him, if he were not hampered by so many restrictions, to play a very effective part in the trial. As matters now stand, the average judge plays only a secondary rôle. He asks few questions and seldom interferes with counsel except upon great provocation. When asked to rule on points of law, he does so with great caution in order that the defendant shall not obtain any colorable basis for an appeal. When he charges the jury he is compelled to instruct them that the defendant is presumed to be innocent and that they may not convict unless they are convinced beyond "a reasonable doubt." He then proceeds to define what constitutes reasonable

doubt, and his definition, although approved by previous decisions of the Supreme Court, is so technical and refined that the jury hardly knows what he is talking about. If the law permits him to comment on the evidence, he does so with great caution, and warns the jury that they are at perfect liberty to disregard his version of the facts. In short, the judge has great latitude in ruling against the prosecution, in directing verdicts of acquittal, in declaring mistrials, etc., but almost no effective authority to push the case vigorously for the state. Being so hampered, he is apt to do the obvious thing and throw the burden onto the jury. When things go wrong, the jury generally gets the blame.

There are many other phases of the jury question which might be mentioned, such as those which develop from the tendency of legislative bodies to pass laws which have no united public sentiment behind them, and which result in wholesale acquittals when attempts are made to enforce them; also the increasing tendency of public opinion to condone, because of excessive sentimentalism, many criminal offenses. We should not expect from our juries a zeal for law enforcement very much higher than exists in the community at large. And perhaps it is one of the great merits of the jury system, in an age when attempts are being made to regulate by criminal statutes so many phases of human conduct, that we should possess an agency which can exercise a palliative influence.

There is another phase of the jury problem which has to do with composition of the jury itself. The character of the *personnel* of the jury is a matter of great importance. It is apparent that if it is composed of persons of high grade intelligence and good moral character, we may expect verdicts of a much higher grade than when it is made up of a miscellaneous assortment of all types of individuals picked at random

from the community without regard to any positive qualifications whatever. It is surprising how little thought has been given to this matter in most communities. In general, it has been deemed sufficient to take at random from the citizenry the required number of persons, trusting to providence and a turn of the jury wheel that they will prove themselves endowed with the requisite intelligence to fulfill their important function satisfactorily. A brief review of the practice in the various states with respect to the method of selecting jurors is appropriate.

A judgement of one's peers, as guaranteed by Constitution and statutes, at the present day means nothing more than a trial by jury in the courts according to the accustomed course of judicial procedure, and by a jury which has been selected in accordance with the provisions of the statutes of the state in which the trial is held, after due challenges have been allowed in accordance with the law. Whatever jury results from the statutory method of selection is all that an accused is entitled to demand. If the system of selecting yields persons of high calibre, trial by jury is one thing; if it yields nothing but the dregs of the community, it is a very different thing. Without proper consideration being given to the subject, trial by jury can never be made to work satisfactorily.

There is a wide diversity as to the method of selecting jurors in the different states of the country, and sometimes there is a considerable difference between the methods in the several judicial districts of the same state. It is not possible to discuss here the details of the various methods, but a few characteristics of the prevailing systems may be pointed out. Perhaps the most common scheme is that of selection by elected jury commissioners. Other methods are selections by commissioners or clerks appointed by the courts, or by the judges of the courts themselves, or by one designated

judge, or by a judge acting with elected or appointed jury commissioners, or by county commissioners, or other public officials. Of the various agencies, the best are those in which the courts exercise a complete supervision. The responsibility for obtaining good jurors ought to be placed squarely on the judges, who either ought to select names personally or appoint those who do so. There is no good reason for delegating the function to elected officials and making what is essentially a judicial matter the plaything of politics. Furthermore, it is highly desirable that the duty of selection should be placed in the hands of one, or at most three persons, in order that responsibility for results may be definitely fixed. A disregard for these rather obvious considerations has contributed much to our failure to fill the jury boxes with satisfactory jurors.

The second phase of jury selection is concerned with the sources from which the names of jurors are derived. Very commonly, the statutes provide that they shall be taken from the lists of persons assessed for tax purposes or from the lists of registered voters. There are no objections to such sources of information as far as they go, but the difficulty is that frequently they are made the *only* sources which may be consulted. This often results in permitting many eligible persons (and frequently very desirable persons) to evade jury duty by the simple expedient of keeping their names off the designated lists. Obviously, all sources of information concerning eligible jurors should be open to the selecting officials.

In the next place, and most important of all, there is, under most schemes of selection, no method provided whereby the selecting officers may obtain information as respects the character of the persons whom they are proposing to select for the jury lists. This is the crux of the whole matter. In small communities, where it is possible to know most of the inhabitants, the matter

is not of so much consequence, but in cities where there are thousands or hundreds of thousands of names to select from, it is apparent that some method must be devised whereby the selecting officer can determine the character of eligible persons before he selects them. The name, residence and occupation contained on voting lists is grossly insufficient. It is also necessary to know whether a proposed juror is able to understand the English language, whether he is physically or mentally incapacitated, whether he is a man of good reputation, and whether he possesses sufficient intelligence to understand the ordinary issues which he will have to decide. In most jurisdictions no attempt is made to secure this type of information, with the result that selections are made almost entirely at random. The elimination of the unfit is left to the excusing process and the system of challenges, neither of which methods are at all suitable to the object of procuring a body of persons with the positive qualifications which are essential.

The usual explanation of why we have poor juries is said to be because the judges excuse the better type and retain those who are interested in receiving the jury fee. No doubt this is an evil, but it is by no means an adequate explanation of why we have so many incompetent juries. The solution is to have no persons placed on the jury lists who are not competent to serve. If this is done, the granting of excuses (and some must be granted) will have no material effect on the character of the body which remains. Much ingenuity has been exercised in devising methods of safeguarding the procedure of filling and making drawings from the jury wheels, with the result that such matters are generally handled in a most careful manner. While it is important that this stage of jury selection should be honestly performed, it is otherwise not a matter of much importance. If the names of worthless persons are placed in the wheel, it, of course, results that they are drawn

from the wheel. The solution is to put only the names of desirable jurors *in,* so that none but desirable ones will come *out.*

Progress along the lines indicated has been made in some jurisdictions. New York state has an intelligently devised jury commissioner system, which, if properly administered, should yield a very high type of juror. Baltimore has a system of selection by a jury judge which is said to give good results. The new system recently established in Pittsburgh promises to prove quite satisfactory. The United States district courts, due to careful methods of selection, generally have high grade juries.

There is much study necessary if the jury system is to be made to work satisfactorily. If we can overcome the bias which generally exists in favor of institutions as they are, and the inertia which impedes the introduction of new methods, trial by jury can be made to work, and work well.

JUROR'S PART IN CRIME[3]

In this year of grace, 1925, it is with profound diffidence that any one who has had practical knowledge and experience along any particular line of human activity should air his opinions and conclusions; for the present day is the millennium—the period of jubilee—for the individual who knows a little about a great many topics, and his views, expressed with the utmost authority, are but so many illustrations of Alexander Pope's immortal warning that "a little knowledge is a dangerous thing." In connection with no subject is this more true than with the subject of crime and the enforcement of the criminal law; and I have been so frequently corrected and contradicted in my views on these

[3] By Charles C. Nott, Jr., judge of the Court of General Sessions, New York City. *Scribner's Magazine.* 79: 94-6. January, 1926.

subjects by young ladies who have taken a six months' course in social uplift or by those of more mature years who on several occasions have taken fruit to the inmates of some penal institution, or by some person who has read a "magazine article" by a convict describing the discomforts to which he had been subjected while in durance, that it is with much hesitation, after twenty-three years spent in the administration of the criminal laws, I advance any ideas on the present conditions of crime in this country.

Making every allowance for the difficulty of obtaining precise figures, because of the deplorable lack of accurate and scientific criminal statistics in most of the United States, there can be but little, if any, doubt that, compared to nearly all other civilized and many half-civilized and uncivilized countries, the volume of crimes, both against the person and property, is appallingly large both in absolute figures and in proportion of the amount of crime to population. It has been calculated that if the ratio of criminal homicides to population were the same here as in England, we would have about four hundred and eighty criminal homicides a year in the United States, instead of which we have over eight thousand. In the last ten years we have suffered over eighty-five thousand of them (more than our losses in killed in the World War) instead of the forty-eight thousand which the English ratio would have produced. The ratios of larcenies, robberies and burglaries are indicated as still more unfavorable to us. The larceny business, in all its different forms and ramifications, may fairly be described as one of the most important and flourishing in the country, and the value of its annual "turn-over" is colossal—not less than three billion dollars, according to the calculations of the burglary and theft insurance companies. The larcenies of automobiles alone amount to millions of dollars a year; the amounts of goods stolen while in transit, from railroads,

express companies and steamship lines run into millions more; while the "hold-up" department of the business has of late years made astonishing progress, and the swindling and "get-rich-quick" departments turn in their millions with increasing regularity, and the workers in the burglary and embezzlement branches can point with pride to their earned profits.

Of course "the law" is blamed for this tremendous exhibition of law-breaking, although few people have in mind clearly what they mean by "the law" in this connection. Certainly our criminal laws—that is, the statutes themselves—are about as good as the corresponding Canadian statutes; yet on one side of an imaginary boundary-line a condition exists differing materially from that on the other, though the criminal laws of the two countries do not differ materially. If by "the law," the administration of the law is meant, a different situation arises. Undoubtedly the administration of the law in all parts of this country is less efficient than in some other countries; but also undoubtedly in some parts of this country it is at least as efficient as in some other countries—and yet even in such parts the percentage of crime is higher with us. To illustrate, the police department of the city of New York and the machinery of the courts are at least as efficient and up to date as those of the island of Bermuda. On the occasion of a visit there a few years ago, I found the island much excited over their first criminal homicide in twenty years—a stabbing, following a quarrel in a saloon. On the basis of proportion of crime to population, the city of New York ought to have had three hundred such killings during those twenty years. It is perfectly certain that they were at least three thousand. While the difference in the administration of the law does account for the excess of crime in this country to some extent varying greatly in different parts

of the country, it comes far short of accounting for the whole excess of crime here.

In my opinion the weak spot in our administration of the criminal law is not so much on our police forces, or our prosecutors, or our police courts as in our juries, which is equivalent to saying—in our people's general attitude to the criminal. The tendency of the American jury is not to deliver a verdict according to the evidence, but to pronounce a sort of judgment of Solomon, although the qualifications of the jurors for such a delicate piece of work are usually in striking contrast to those of the monarch whom they imitate. Thus, in a homicide case, they do not decide whether A unlawfully killed B, but whether B had really cheated A out of the $8.50 which was the subject-matter of the dispute, and therefore ought to have been killed; not whether C stole $500 from his employers, but whether the latter were paying him an adequate salary in view of his having a wife and eleven children, and also whether the employers were, or were not, using fair methods in competing with the store on the next block; not whether D had criminally abducted the girl, but whether the judge would give him more than one year, if he had so abducted her.

This quality in American juries is the expression of a wide and underlying attitude in the mass of our people toward the criminal. Of course, every one has, and expresses, a dislike for crime in the abstract, but in dealing with the concrete manifestation of crime, which is the criminal, this attitude of good-natured sympathy and tolerance for him, and of indifference to the evil he accomplishes, goes far toward paralyzing the efforts of judges and prosecutors.

In the city of New York about nine hundred men, women, and children are killed annually by motor vehicles, a substantial proportion of them being the victims of gross negligence and disregard of the rights of pedes-

trians at street crossings. The police almost invariably arrest in such cases, and the district attorney prosecutes in a large number. If juries were capable of looking beyond the individual and of making an example for the general good, this evil could be materially reduced by the certainty that a fatal accident due to negligence would bring punishment. But our juries are incapable of anything of the kind, and so constantly acquit even in the clearest and most extreme cases that the prosecutor goes into these cases as foregone failures. The defendants' attorneys draw a pathetic picture of the disrupted home, and inquire whether a model husband and father, who was guilty only of a deplorable lack of judgment under trying circumstances, should be sent to Sing Sing to herd with murderers and thieves—and the juries acquit.

GREAT AMERICAN GAME[4]

The American people are great lovers of sport. It is quite common to hear discussions as to which is our favorite game. Some contend it is baseball, or football; others argue in favor of golf or bridge. The claims of another sport might be advanced, but let us not overlook the leader—the Great American Game is the trial of a criminal case.

Let us step into the stadium, or rather the courtroom, and watch this interesting game in actual progress. A man is charged with a serious offense. Witnesses come forward with testimony which is amply sufficient to substantiate the charge and, as the defendant is unable to refute this evidence, he is found guilty by the jury. He then appeals. Does the prisoner ground this appeal upon any claim of innocence? No, he merely points an accusing finger at the end of the indictment and says, "Just look at this awful sentence! What terrible

[4] From article by Rollin M. Perkins, professor of law, State University of Iowa. *Harper's Monthly Magazine.* 155: 750-8. November, 1927.

English! It concludes 'against the peace and dignity of state' whereas the conclusion should be against the peace and dignity of *the* state.'" The court of last resort studies this rhetorical problem with due deliberation and then penalizes the state one conviction for being off-side.

Do not for a moment think that I am indulging in fiction. Almost any lawyer can cite one or more cases in which a conviction has been reversed either for the reason stated or for one very much like it. Perhaps he will refer you to the case in which a verdict of guilty was upset because the indictment concluded "against the peace and dignity of the state of W. Virginia" and the court thought the word *West* should have been written in full!

Let us return to the field of action. Again the supreme court of some state is reversing a conviction because of a faulty indictment. "What is wrong?" the prosecuting attorney hastens to ask. "Could not the defendant see what was intended by this charge?" "Well," replies the court in effect, "he could no doubt tell what was intended easily enough, but you forgot to put in the word 'feloniously.'" In handing down still another reversal the court calls attention to the fatal omission of the word "maliciously" or the phrase "then and there" or the letter "S." These convictions are reversed, it should be noted, not because of failure to prove guilt at the trial, but because of some slight slip in the indictment which is not shown to have embarrassed the defendant in any way, Thus in one case a conviction was reversed because the indictment did not, in so many words, say a certain building was situated in South Chicago, the court adding that even proof that the building was actually located in South Chicago could not cure this defect.

In the interpretation of any legal instrument other than one which seeks to charge the commission of a crime it is considered important to inquire into the intent

with which it was drawn. If from the entire instrument it is clear what was intended the document is declared to mean just that. Not so with an indictment or an information in the Great American Game. In the interpretation of these the effort is not to find out what was intended, but to see if it would not be possible by some twist of logic (strained to the utmost if necessary) to read out of the instrument the meaning which was obviously intended to be put in.

Here is a case in which the defendant is on trial for fraudulent banking. The evidence discloses that he was an officer of a bank and as such received a deposit, while the bank was insolvent, with full knowledge of the insolvency. This is contrary to the statute, and the jury brings in a verdict of guilty. The defendant appeals because, so he claims, the indictment fails to say the bank was insolvent when the deposit was received. Let us look at the indictment. It alleges the receipt of the deposit by him "after the bank was insolvent." Surely we have here a conviction which will stand; can there be any possible doubt as to the meaning of this statement? Again we are doomed to disappointment, however, for the court reverses this case also, giving in substance the following explanation: To say he received the deposit "after the bank was insolvent" is not a sufficient averment of the bank's insolvency at the time. The bank might become insolvent and later get back on its feet and be solvent again. A deposit made thereafter could be said to have been made "after the bank was insolvent." Of course the English language is not used in any such way as a matter of fact and nobody would so understand it, but such usage is theoretically possible, and hence the conviction must be reversed. Just think of that!

This case is much like another recent one in which a conviction of bigamy was reversed. The evidence at the trial had established the defendant's guilt beyond all

question, but the appellate court could not find in the indictment any averment that the first wife was alive at the time he married the second. The defendant "well knew his first wife to be alive at the time," according to the wording of the charge, but this was held to be insufficient. He could not possibly "know" his first wife was alive if she was dead. . . The same process of twisting the obvious meaning out of an indictment by outworn notions of the interpretation of such instruments was used in a case of larceny. The defendant was convicted and sentenced to two years in the penitentiary for stealing an appearance bond from the office of the county judge. This conviction was reversed because although the indictment averred that he did "steal" the bond from the office of the county judge, there was no allegation "that the bond was taken and carried away against the will or without the consent of the county judge, or with the intention of depriving the owner thereof or converting the same to his own use."

Any number of examples of similar reasoning might be cited in cases of assault with intent to inflict great bodily injury. For instance, in one such case the defendant was convicted under an indictment which charged that he "did, with a deadly weapon . . with intent then and there, wickedly, unlawfully, maliciously and feloniously to strike and bruise . . . inflict . . . a great bodily injury . . ." This conviction was reversed on the ground that the indictment did not charge an intent to inflict a great bodily injury. The defendant, so the court suggests in substance, may have made this "felonious" assault with a "deadly weapon" with intent to commit less than a felony and the "injury may have been greater than was intended." . . . Because the reversal of the case by this ancient logic is such an outrage upon justice, it is refreshing to find two justices dissenting upon the ground " that a person of common under-

standing would be in no doubt as to the offense which the indictment in this case was designed to charge."

We might go on with many more cases of the same kind, but technical reversals are not always due to matters determinable from a mere reading of the indictment itself. The same result is often reached because of some slight and insignificant variance between the averment in the indictment and the proof at the trial. What is generally recognized as the outstanding classic in this field is a Delaware case in which the defendant was convicted of stealing shoes. The indictment charged him with the larceny of a *pair* of shoes and his theft of two shoes was quite clear from the evidence. But in the excitement of the moment it seems he picked up two shoes both for the right foot. Because of this fact the conviction was reversed.

The shocking feature of all these cases is that the inquiry into guilt or innocence is completely lost sight of while the court worries about something else.

Technical reversals, unfortunately, are by no means limited to mistakes in the indictment. The admission or exclusion of evidence offers an excellent opportunity for the reversal of cases on absurd technicalities. Anyone expects a conviction of crime to be reversed if the evidence at the trial was insufficient to establish the defendant's guilt; who but a lawyer would expect the conviction to be set aside because the evidence showed too much? Yet this is not unknown.

In a certain case a conviction of robbery was reversed because the indictment said the person robbed was "Wesley Duke" and the evidence showed the robbery of "J. W. Duke" by the defendant, but failed to identify Wesley Duke and J. W. Duke as one and the same. This was undoubtedly a mere oversight on the part of the prosecuting attorney. But listen to the statement of the court: "The defendant was under no duty, when requesting the affirmative charge, to bring the fail-

ure of proof to the attention of the court." In other words it was a very clever move for the defendant's attorney to keep silent as to this oversight until too late to correct it, and then, if the first jury decided against him, to demand a new trial. What matter if justice is defeated with the connivance of an officer of the court so long as the rules of the game are observed!

In fact, our criminal procedure is so overburdened with rules which exist for some reason other than to aid in the search for the truth of the matter that there is hardly a step in the whole proceedings where some slight slip will not result in the case being disposed of on a technicality rather than on its merits.

Dissatisfaction with the administration of justice is by no means a new thing. It is "as old as law." Nor is dissatisfaction with criminal law and its administration a local or American phenomenon. It was world wide at the beginning of the second decade of the present century. The ancient nature of this complaint and its widespread scope in recent times suggest the possible existence of certain inherent difficulties in the administrations of criminal justice. It is well to recognize the presence of such difficulties and the impossibility of devising a plan of criminal procedure which will be perfect in its operation. The cases referred to above all have the objectionable feature of having been decided on some point of procedure rather than on the guilt or innocence of the defendant. It may be difficult to eliminate such decisions entirely. But certainly it will be possible to move a long way from our present position, which is causing dissatisfaction with the methods of American criminal law to increase from day to day.

Inquiries among representative citizens of one of our great cities a few years ago brought out the fact that three out of five considered the better enforcement of our criminal laws to be the most important public question of the time. In the press, over the radio, from the

pulpit and the platform, and in general conversation we are constantly reminded of the general breakdown of our machinery for the enforcement of criminal justice, and of the ineffectiveness of our out-of-date methods of trying criminal cases. The absurdity of our technicalities in criminal procedure has seldom been so well pictured as in these words which appeared in the *Journal of Criminal Law and Criminology*:

> To a layman, such insistence upon worn-out and useless forms seems as absurd as it would have seemed to Goldsmith's Chinese traveler if he had been told that a certain murderer had escaped punishment because, in the course of the proceedings, the clerk of the court, in affixing the seal, had committed the error of moistening it with a sponge, instead of following the time-honored and strictly legal method of licking it with his tongue.

The writer once asked a juror why he voted for a verdict of not guilty in a certain case. All the evidence pointed unmistakably to the guilt of the defendant, yet the jury had reached a unanimous verdict in his favor on the first ballot. The juror's reply was interesting. He said, "There is no doubt of the defendant's guilt, but the state didn't show it." This juror (and the other eleven in the same case) had become so thoroughly imbued with the spirit of the game being played in the courtroom that he forgot all about the question of guilt or innocence and gave his decision to the lawyer who seemed to him to play a more skillful game than his opponent.

This point of view is not limited to the members of the jury. Every step in the trial of a case and in the proceedings looking toward a new trial or a reversal is taken as if in a game. The one outstanding feature of importance is to see that the play is conducted according to the rules, and the judge is merely an umpire to enforce them. If we could only wipe out this pernicious sporting theory of justice and come to view criminal procedure as a part of our general scheme of so-

cial engineering we should materially hasten the time when here, as well as in England and in Canada, the search for the real truth would over-shadow all matters of form and technicality, and the outstanding purpose of a criminal trial be recognized by all to be the undivided effort to ascertain the guilt or innocence of the person charged.

The cases which I have referred to emphasize the undue advantage given to the criminal by our antiquated system of criminal procedure. Let it not be supposed for a moment, however, that this is the whole of the picture. There is another side which is no less distressing. The difficulty of getting at the facts in the courtroom induces a certain type of mind to seek for this information elsewhere where restraints are not merely less rigid but are lacking altogether. The result is the "third degree." Thus while over-tenderness for the accused causes many who are guilty to escape their just punishment, the indirect result is to cause many to suffer humiliation and even physical torture of a nature not authorized by law even for the guilty—and some of these sufferers are innocent of any crime. Let us add, parenthetically, that a legal system which encourages law-enforcing officials to act outside of the law must be held accountable not only for the direct ill consequences of such unlawful conduct, but also for the general lawlessness which it thus breeds. For who has such a large responsibility to live up to the full spirit of the law as the officer whose duty it is to enforce it?

The long delays of our criminal procedure give unfair aid to the man who is guilty. When his trial finally does come the public may have lost interest in his case and important witnesses and valuable evidence may have disappeared, thus making it much easier for him to obtain an acquittal than would have been possible shortly after the offense. But while the excessive delay works to the advantage of the man who is guilty, it is a dis-

tinct handicap to the man who is innocent, at least if he happens to be without sufficient funds or friends to secure bail. For not infrequently an innocent man remains in jail longer, while he is waiting to establish his innocence, than would have been required to serve out his term if he had been convicted in the first place. And after he gets out he finds his job gone and probably encounters difficulty in securing a new one because of the taint which has attached to his name by reason of his long stay in jail, notwithstanding the ultimate verdict of not guilty.

The harm done by the shyster lawyer and the professonal bondsman in warding off punishment in cases where it should be inflicted is too well known to require repetition at this time. This, however, is not the only harm they do; for while they render undue aid and assistance to the man who is guilty, they do not hesitate to exploit the unfortunate man who is innocent.

Thus our machinery for the trial of criminal cases tends to give undue benefits to the guilty and to place unnecessary hardships upon the innocent. Not even this statement does full justice to the situation. Our sporting theory of justice, our overemphasis upon the rules of the game, transform the judge into a mere ringside referee whose business is not to concern himself with whether or not the case reaches the proper result, but merely to see that the contestants do not overstep the rules while the game is on. And the pernicious influence of this system goes beyond the mere opportunity for miscarriage of justice in the case on trial. If a witness wilfully commits perjury on the stand it is proper for the jury to be made aware of this, if possible; if his word is very questionable because of his unsavory character there is no reason why the jury should be kept in ignorance of this fact; and if he makes unintentional mistakes in testimony they should be pointed

out and corrected. But the rules of the game as it is played today place no proper restrictions upon the treatment to which a witness may be subjected in the courtroom. What matter if clean character be aspersed by false charges or insidious insinuations if the cause of one side or the other be promoted in this way? What matter how obviously honest a witness may be if by clever cross-questioning he can be confused and the effect of his testimony weakened in the minds of the jurors? What matter how truly a witness may merit his good reputation if blackening it by groundless questions and suggestions will tend to discredit his statements?

Probably very few lawyers set out with a deliberate design of abusing witnesses to such an extent as to cause upright citizens to shrink from testifying. Yet our unfortunate system tends to accomplish this result. To assist in reaching the proper decision in a criminal trial should be the delight of every law-abiding citizen. He should be glad to step forward and volunteer any information which may be of real value in deciding the case. And yet how many of those of high standing in the community do not prefer to remain silent rather than be exposed to the abuse of counsel in the courtroom? It gains us nothing to dodge the issue by saying that upright citizens should not allow such intimidation to keep them from performing their duty. It gains us little to point to the large number of leaders of the legal profession who scorn the resort to abusive tactics in the trial of cases. The fact remains that our system permits—perhaps we should say induces—so many lawyers to use such tactics that there is a widespread fear of the courtroom among even the finest people in the community. We cannot expect very satisfactory results from a system which tends to silence the most upright witnesses.

Having seen the many defects of our present system,

it is only natural to wonder why it was ever developed. At this point we are sure to encounter the suggestion that it is better for ninety-nine guilty men to escape than for one who is innocent to be punished. But if, for the sake of argument, we concede the strength of this suggestion, are we to infer therefrom that the conduct of the trial as a game, in which the important object is to enforce rules rather than to get at the real truth of the matter, is necessary to protect the innocent? Since when did an innocent man require an absurd technicality for his acquittal? What has an innocent man to gain by emphasis upon form rather than substance? What has an innocent man to gain by long delays while the unjust charge is hanging over him? The answers to these questions are too obvious to require statement. Our present system of criminal procedure is decidedly detrimental to the man who is innocent of the charge against him.

To find the cause of the development of our present system, therefore, we must examine factors other than the effort to protect innocence. There is very little, if any, of our sporting theory of justice, of our losing sight of the substance in the form, to be found in the trial of a criminal case in England today. But our system was copied after that once used by the English. They have since cast it aside in the junk heap of legal absurdities together with the earlier trial by battle, and yet we must look to the English criminal procedure of a century or more ago if we are to understand why the system, to which we still cling, was developed.

Since such a system quite obviously was not necessary for the protection of the innocent, the inquiry arises was it developed to protect the guilty? The answer seems to be yes. At a time when the English law provided punishments which were out of all proportion to the seriousness of the offense committed, when conviction of almost any crime called for the death of the

prisoner, there was a "humane conspiracy" to defeat the law and acquit the defendant. This must not be interpreted to imply the existence of a well-formed purposive endeavor to develop a judicial machinery of a particular type for the trial of criminal cases. It was quite otherwise. Time and again the judges found themselves confronted with an individual case in which the law called for the death of the defendant if duly convicted, but in which the moral sense of the time cried out against so heavy a penalty for such misconduct. And time and again the judges seized upon some technicality or other to save the defendant. On many another occasion the judges were confronted with some situation which was quite similar except that the heinousness of the crime quite justified the severe penalty, or the penalty had been reduced to what seemed proper under the circumstances. And in each case of this sort the judges refined upon refinement in the effort to let justice claim the penalty. Thus it was that the judges, leaning far backward in one case to avoid the infliction of a punishment which seemed outrageously excessive, and leaning equally far forward in another case to hold the prisoner to a penalty which seemed entirely just, established precedents of procedure which later judges deemed themselves bound to follow regardless of the justice of the particular situation. So by mere chance were developed those "rules of the game," the letter-perfect enforcement of which now entirely overshadows the effort to distinguish guilt from innocence.

PROCEDURE IN ENGLAND AND AMERICA[5]

The judicial annals of all our states are full of flagrant instances of the breakdown of justice on account of the delays in bringing cases to trial. That criminal

[5] From article "Crime and Judicial Inefficiency," by James W. Garner, associate professor of political science, University of Illinois. *Annals of the American Academy.* 29: 601-18. May, 1907.

prosecutions may be more promptly initiated and rapidly expedited the experience of England affords abundant evidence. It is the practice there to bring the accused before a magistrate within a few hours after his arrest and commit him to the next session. Rarely three months elapse between the committment and the infliction of the punishment if he is found guilty.

After the case has been reached on the calendar there is the delay of impaneling the jury—a delay which, under the practice of most of our states, is coming more and more to be an intolerable evil. This proceeding, as Justice Brown well observes, ought never consume more than an hour or two, and under the English procedure this is the rule. Two flagrant instances of this evil were recently afforded by the Gilhooley and Shea cases in Chicago. In the former case nine and a half weeks were required to select the jury, involving an examination of 4,150 talesmen, and at a cost of some twenty thousand dollars to the state. The selection of the first Shea jury required thirteen weeks, the summoning of ten thousand veniremen, the examination of 4,716 talesman at a cost of $40,000 to the state, and over $20,000 to the defendant, and there is no reason to believe that the jury finally chosen were any better qualified than the first twelve men examined. The court permitted counsel to introduce false issues and ask irrelevant questions for indefensible challenges. In the Gilhooley trial counsel for the defense interrogated one of the jurors nearly two hours, mostly on immaterial matters, and the state's attorney put him through a similar ordeal, the request of the state that thirty minutes be made the maximum time for the examination having been denied by the court. According to the English practice the requirements of due process of law in the selection of juries are satisfied by the simple inquiry whether the prospective juror is in any way related to the defendant, and if he knows of any reason why he

is unable to return a verdict in accordance with the law and the evidence. In the second Shea trial the judge followed this sensible rule and the jury was selected in twelve days. He refused to permit the disgraceful wrangling, dilatory obstructions and rambling long-drawn-out and irrelevant interrogations which marked the proceeding by which the first jury had been impaneled.

The remedies for most of the evils that have grown up in connection with the selections of juries are: The prohibition of irrelevant examinations, the making of the decision of the trial judge final upon objections to questions asked prospective jurors, and the forbidding of reversals upon such decisions unless they amount to a clear abuse of discretion, a substantial reduction of the number of challenges allowed, provision for special venires in important cases, and the amelioration of the conditions of jury service by treating jurors not like prisoners undergoing punishment, but as citizens performing an honorable public service.

The progress of the trial after the selection of the jury is often unnecessarily hindered by slavish adherence to rules of procedure which are prolix, antiquated in many particulars and honeycombed with technicalities which to a layman seem to have no other purpose than to delay judgment or provide loopholes of escape for criminals. Indictments which are not loaded down with meaningless verbiage and which do not go into an absurd degree of particularity—which, in short, do not conform in the minutest detail to the technical requirements of the "sacred" forms of procedure, are quashed. Every prosecuting officer knows how difficult it is, on account of the insistence of the courts upon technical accuracy, to frame an indictment that will be sustained. Not infrequently ingenious counsel who have hopeless cases refrain from demurring to indictments which they

know to be technically faulty in order that they may move for new trials in case their clients are convicted. If the indictment is sustained there is always a probability that the case will be postponed, when called, on account of the unpreparedness of counsel, the absence of material witnesses or similar causes. Everyone has known of notorious cases to be continued until finally the popular demand for prosecution subsided, and the state's attorney, through sheer worry or lack of interest, dropped the case and turned the criminal loose. Here, as in other respects, the English procedure is an improvement upon that followed generally in the American states. Except for sickness, evidence of which must be produced in writing, an English judge will not permit continuances or adjournments. No request to have a case stand over or to go to the next term merely for the convenience of counsel, says a prominent London barrister, would be listened to.

The progress of the trial is frequently unnecessarily delayed by the method of examining witnesses and by protracted arguments over questions concerning the admissibility of evidence. It is a common complaint against our method of criminal procedure that too much time is wasted over technical objections to evidence. Here again the English practice of forbidding long-drawn-out arguments on such questions might well be followed in the United States. Justice Ingraham, of the New York Supreme Court says, "I have heard cases tried in England quite a number of times, both at the Assizes and in London, and I do not think I ever heard five minutes given during a trial of a case to the discussion of questions of evidence. I have seen case after case go through without the question of evidence being raised at all. This is a reform which any judge who has the proper conception of his duty may introduce without exceeding his legal authority.

The progress of criminal trials in England is further facilitated by a procedure which is simple and expeditious, and which relieves the trial court of the preliminary work of preparing the case for trial. In the beginning the case is taken in hand by a master who whips it into shape, and engineers it through the preliminary stage, after which a trained barrister takes it in charge and it is quickly disposed of by the court. Thus the time of the judge is never wasted in hearing applications, interlocutory motions and other matters which may as well be disposed of out of court, thus leaving the court nothing to do but try the case. The English system of pleading has in late years been freed from technicalities, so that not only has the evil of retrials been greatly reduced, but the ability of the courts to dispatch business has largely increased. Concerning the efficiency of the English procedure and the reasons for its superiority over that in the American states, Justice Brown, recently retired from the Supreme Court, has this to say:

> One who has watched day by day the practical administration of justice in an English court cannot but be struck by the celerity, accuracy, and disregard of mere technicalities with which business is transacted. One is irresistibly impelled to ask himself why it is that, with the reputation of Americans for doing everything from the building of bridges over the Nile or battleships for Russia and Japan, to harvesting, reaping, plowing and even making butter by machinery, faster than other people, a court in conservative old England will dispose of half a dozen jury cases in the time that would be required here for dispatching one. The cause is not far to seek. It lies in the close confinement of counsel to the questions at issue and the prompt interposition of the court to prevent delay. The trial is conducted by men trained for that special purpose, whose interest is to expedite and not to prolong them. No time is wasted in immaterial matters. Objections to testimony are discouraged, rarely argued and almost never made the subject of exception. The testimony is confined to the exact point in issue. Mere oratory is at a discount. New trials are rarely granted. A criminal trial especially is a serious business, since in case of a verdict of guilty it is all up with the defendant and nothing can save him from punishment but the

pardoning power of the Home Secretary. The result is that homicides are infrequent, and offenders rarely escape punishment for their crimes.

The practice of allowing new trials upon trifling errors has become an evil so serious as to bring our system of criminal justice into great disrepute. A committee of the American Bar Association, after an investigation of the subject in 1887, reported that new trials were granted 46 per cent of all cases brought under review in the appellate courts of this country. The Commission on the Law's Delay, created by the authority of the legislature of New York in 1903, found that the proportion in that state was 42 per cent. Upon examination of the Supreme Court reports of Illinois, covering the years of 1903-05, I found the proportion in this state to be about 40 per cent, fifteen of the twenty-five criminal cases reversed being upon errors which could hardly be considered as substantial in the sense that they could be shown affirmatively to prejudice the rights of the accused. A large proportion of the reversals were founded upon errors of practice and procedure, and related principally to faulty indictments and the admission or exclusion of certain evidence. A similar examination of the Wisconsin reports showed the proportion of reversals to be about 30 per cent of the total number of appealed cases. A comparison of these figures with those furnished by the master of judicial statistics in England affords striking evidence of the widely different attitude taken by the English appellate courts toward the question of error. In the year 1900, of three hundred and thirty-seven cases appealed from the High Court of Justice only fifteen were remanded for retrial, and in 1904, of five hundred and fifty-five cases reviewed by the Court of Appeal only nine were remanded for new trials. Federal Judge Amidon, of North Dakota, in an address before the Minnesota Bar Association last year, stated that he had personally examined the law

reports of England covering the period from 1890 to 1900, with the result that he found that of all cases reviewed on appeal in that country new trials were granted in less than 3½ per cent. It is a rule of the English procedure that no judgment or verdict of a lower court shall be disturbed or a new trial granted for error if there were sufficient evidence to justify the judgment or verdict, or if evidence erroneously excluded would not, in the opinion of the Appellate Court, have changed the result if it had been admitted. In other words, judgment is rendered on the merits of the case, and not on mere considerations of technical error in the record or upon questions collateral thereto. Instead of presuming that error in the trial below is prejudicial to the defendant, the presumption is that it is harmless, and it is incumbent upon the appellant to show the contrary.

One of the results of the strict enforcement of this rule by the English appellate courts is a reduction in the number of cases appealed. A defeated party who has no case on its merits can have no incentive to take an appeal. He knows well that there is no chance of securing a reversal upon immaterial errors of the court below. The consequence is that not more than one case in ten is appealed from the high court, whereas in New York state it is said that on an average 33 per cent of the cases tried in the first department of the Supreme Court are appealed. The English procedure does not allow a bill of exceptions to be filed and argued. If there is dissatisfaction with the verdict or judgment, application may be made to the Appellate Court in writing, accompanied by copies of the pleadings and evidence made from stenographic reports.

Moreover, the English appellate judge has all the powers of the trial judge, and he may make any order or judgment which ought to have been made by the trial court. If by reason of error below a wrong judgment was entered, the Appellate Court may enter the judg-

ment which justice requires instead of sending the case back for retrial upon errors which were not clearly prejudicial to the right of the accused. In other words, the English appellate courts proceed on the principle that it is their business to administer justice as well as the law—a sensible rule, which originally existed at common law, but, like many of the other common law rules of legal procedure, has been changed by statute or custom.

It is the American practice to allow appeals as a matter of course, with little regard to the merits of the case. This privilege should be limited, as in England, to cases where the trial judge in his discretion reserves for review by the higher court some question of law which he considers doubtful and has decided adversely to the defendant. It is no infringement upon the right of any person who has been convicted by the unanimous verdict of a jury chosen from his neighborhood to say that he shall not be given another chance to establish his innocence, unless it can be affirmatively shown that substantial justice was not done in the first trial. The present wide latitude of appeal, although in theory open to all, is in fact practically closed to the poor litigant on account of the expense involved. The rule thus operates to the great advantage of the well-to-do litigant by opening an avenue of possible escape which is in practice denied to the man without means. It is a common saying which is becoming truer all the time that the rich criminal with unlimited means at his disposal can, through the process of appeals and new trials, escape the punishment which he deserves and which he would receive if he were a poor man. Any system of criminal justice which makes possible any such inequality in the administration of the criminal law is fundamentally wrong in principle and dangerous in practice. It not only encourages lawlessness among the upper classes but impairs the confidence of the lower classes

in the courts and promotes the spirit of lynch law and anarchy among them. Some valuable lessons might well be learned by our legal reformers from the English and continental practice. It has not been very many years since England was agitated over the situation arising from the virtual breakdown of her judicial machinery, but they set about in a quiet way to make improvements, with the result that they have brought their judicial system up to a plane of efficiency which has not yet been attained in any American state. The New York State Commission on the Laws Delay report that it had been "profoundly impressed" by the character and results of the English procedure, and declared that the English courts from having been the most dilatory in the world had become in recent years the most expeditious, and expressed the opinion that we "could not do better than adopt some of these modern methods of procedure which have been so thoroughly tested in England and have proven to work so well.

The English have largely freed their procedure from technicalities, have simplified it and made it less cumbersome and expensive, have raised the judge to a more commanding position in the conduct of the trial, and assigned the jury its true place, have abolished the doctrine of presumed error, restricted the privilege of appeal to more reasonable limits, and in various other ways provided a procedure which, to an American lawyer accustomed to the delays and uncertainties of our system, seems wonderful indeed. The procedure of the German courts since the adoption of the imperial codes presents many features analagous to that of England. There are no technicalities in pleading; the judge participates in determining what shall be proved and when and in what manner the proof is to be made; the rules of evidence are simple, trials are promptly started and rapidly expedited, and criminals are punished with a degree of certainty unknown in America. In France, likewise,

the criminal law is administered in a way which serves as an effective deterrent of crime and secures general respect for law and authority.

NUMBER OF JURORS NECESSARY TO RENDER A VERDICT[6]

The constitution of every state guarantees the right to trial by jury in criminal cases. In civil cases the right to trial by jury is guaranteed by the constitutions in all states except Louisiana and Utah. Important changes, however, have been made in some of the features of the jury system as it existed at common law, and these changes will be commented on in the following paragraphs.

Civil Cases. A less than unanimous verdict is provided for or permitted in eighteen states in civil cases in courts of record. Constitutional provisions allowing a less than unanimous verdict in civil cases are self-executing in California, Idaho, Oregon, Utah, Nevada, Oklahoma, Texas and Montana. In Missouri, a provision is self-executing as to juries in courts of record but not as to juries in courts not of record. In Kentucky, Ohio, South Dakota, Arizona, Mississippi, Washington, Minnesota, Colorado, Nebraska and New Mexico, also Wisconsin, the constitutions permit legislative provision for a less than unanimous verdict.

The constitutions of California, Idaho, Oregon, Utah, Nevada, Oklahoma and Missouri, provide that a verdict may be rendered by three-fourths of the jury in civil cases. The constitution of Montana provides that two-thirds of the jury may render a verdict, and the constitution of Texas that nine or more jurors may return a verdict. In Nevada the constitution provides that the

[6] From Chicago, Illinois. Municipal Reference Library. *Notes on Laws of States Fixing the Number of Jurors Necessary to Render a Verdict in Jury Trials.* 7p. typewritten. Frederick Rex, compiler. 1927.

legislature may by a two-thirds vote require a unanimous verdict.

The constitutions of Kentucky, Ohio and South Dakota permit the legislature to provide that three-fourths or more of the jury may return a verdict. In Arizona, Mississippi and Washington, the constitutions permit the legislature to provide that nine or more jurors may return a verdict.

The Minnesota constitution is more conservative. It provides that the legislature may permit five-sixths of the jury to return a verdict after the jury has deliberated not less than six hours. The statutes of Minnesota permit a five-sixths verdict after the jury has been deliberating not less than twelve hours.

In Colorado and New Mexico, the constitutions permit the legislature to provide for a less than unanimous verdict.

Criminal Cases. A unanimous verdict of a jury of twelve is required by all states in capital cases.

In felonies, a unanimous verdict is required in all states except Louisiana. Article 116 of the Louisana constitution provides that cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor by a jury of twelve, nine of whom concurring, may render a verdict. In capital cases, Louisiana requires the unanimous verdict of a jury of twelve.

In cases below the grade of felony the constitutions of Oklahoma and Texas provide that three-fourths of the jury may render a verdict. The constitution of Montana provides that in criminal cases below the grade of felony two-thirds of the jury may render a verdict, and the constitution of Idaho permits the legislature to provide for a two-thirds verdict in misdemeanors.

The constitution of Texas also provides that, "when pending the trial of any case, one or more jurors, not

exceeding three, may die or be disabled from sitting, the remainder of the jury shall have power to render a verdict." By statute in some states an extra juror is provided for such a contingency.

DISCUSSION FAVORABLE TO JURY

TRIAL BY JUDGE AND JURY[1]

Reduced to its last analysis the intelligent and impartial administration of justice is all there is of a free government. It is the public justice that holds the community together. It is to the courts that all must look for the protection of their liberty, person, property, and reputation.

The judicial department is not commonly regarded as the popular department of the government, but it is, in fact, the people's department; the department in the administration of which the people have a greater concern than in any other. It is the only department which comes home to them and deals with them in all the relations of life, from their birth to their death, and with their heirs and estates after their death; and it is the only department in the direct administration of which they have a constitutional right to participate.

By the term "trial by judge and jury" is implied a trial which takes place before a judge and jury—a trial in which the judge is commonly, though not in all cases, the exclusive judge of the law, and the jury the exclusive judge of the facts, and in some cases of the law also, and it comprehends besides the right of the citizen to have that kind of a trial.

In the judgment of Englishmen the right of trial by jury continues to this day to be the most valuable right secured to them by their constitution. All Englishmen acquainted with the history of their country know that

[1] From article by Henry Clay Caldwell, former United States Circuit judge, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit. *American Federationist.* 17: 385-99. May, 1910.

it is not to the opinions of the judges, but to the verdicts of juries who courageously and firmly stood out against the judges, that they owe their most precious rights and liberties. The right of the people to assemble for lawful purposes and the right to address them when they were assembled, the right of free speech and the freedom of press, and the right of petition for the redress of grievances, were secured to the English people by English juries over the vehement protest of the judges.

Peremptory charges, browbeating, censures, fines, and imprisonment were the weapons used by the judges to coerce juries to render verdicts conformable to their views; but happily for England, and for America, too, the love of liberty, courage, and endurance of English juries finally triumphed over despotic power and its servile judges. In view of the actual experience of the English people with judges and juries, it is not surprising that her greatest statesmen and lawyers have expressed their preference for trial by jury in the strongest terms.

A few of the cases in which the juries triumphed over the judges, and in which their verdicts have become foundation stones of the British constitution, may be seen by reference to 22 *American Law Review* and in the dissenting opinion in Hopkins *vs.* Oxley Stave Company.

Passing from England to our own country, we find that the king's judges in the colonies were as hostile to the rights and liberties of the people as their brethren in England. But a part, and the best part, of the inheritance of the colonies was the right of trial by jury, and fortunately colonial juries were imbued with the love of liberty and splendid courage and independence that characterized English juries.

It is an interesting historical fact that despotic power and official oppression received its first check in the colonies at the hands of a New York jury. The blow was a staggering one. It was the entering wedge to free-

dom which later was driven home. William Crosby was the governor of New York in 1734. In the administration of his office he was unscrupulous, avaricious, and arbitrary. The New York *Weekly Journal,* a paper established to defend the cause of liberty against arbitrary power, exposed his official corruption and oppression. For this its publisher, John Peter Zenger, was thrown into prison and a criminal information filed against him by the Attorney-General for libeling the governor and other colonial officers. History tells us the case excited intense interest, not in New York only, but in other colonies, for it involved the vital issue of the liberty of speech and of the press without which the people of the colonies could not hope to be free. The case was brought on for trial before Chief Justice De Lancy, whose first act was to disbar Zenger's counsel for questioning the validity of the judge's commission. Zenger's friends then sent to Philadelphia for Andrew Hamilton, one of the foremost lawyers of his time, who came to New York to defend him. Zenger entered a plea of not guilty, admitted the publication of the alleged libel, and justified it by asserting its truth. A jury was impaneled to try the case. The chief justice refused to permit the defendant to prove the truth of the publication, and charged the jury that it was libelous, and that it was their duty to return a verdict of guilty. The jury retired and soon returned with a verdict of "Not guilty." The verdict electrified the country. Gouverneur Morris, one of the ablest and most sagacious statesmen of the Revolutionary period, dated American liberty not from the Stamp Act of 1765, nor yet from the "Boston Tea Party," but from the verdict of the jury in Zenger's case. The rendition of this verdict constituted the immortalizing moment of those men's lives, and is the richest heritage of their descendants. This historic incident would not be complete without adding that the people bore Zenger's lawyer, Hamilton, out of the courtroom

on their shoulders, and that the common council of New York gave him the freedom of the city in a gold box for his gratuitous services in "defense of the rights of mankind and the liberty of the press."

When the framers of the Declaration of Independence came to make a formal statement of the grievances of the colonists against King George, one of the chief counts of the indictment was "for depriving them in many cases of the benefit of trial by jury." While trial by jury was an undoubted heritage of the people of this country, they were unwilling that such a supreme and vital right should rest on the unwritten or common law. They were stern and inflexible in their demand that the right should be anchored in the Constitution in terms so explicit and peremptory as to make any evasion or denial of it impossible, except by overthrowing the Constitution itself. When the several provisions of the Constitution are read in connection we are amazed at their fullness and completeness. No more resolute and inexorable purpose to accomplish a particular end ever found expression on paper. They will bear repeating—indeed, they cannot be repeated too often:

"The trial of all crimes, except in cases of impeachment, shall be by jury;" "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;" "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury;" "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." These mandatory provisions of the Constitution are not obsolete, and are not to be evaded or nullified by mustering against them a little horde of equity maxims and obsolete precedents which had their origin in a monarchical government

having no written constitution. No reasoning and no precedents can avail to deprive the citizen accused of crime of his right to a jury trial guaranteed to him by the provisions of the Constitution, "except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war, or of public danger." These exceptions serve to emphasize the right and to demonstrate that it is absolute and unqualified both in criminal and civil suits, save in the excepted cases. These constitutional guaranties are not to be swept aside by an equitable invention which turns crime into a contempt and confers on a judge the power to frame an extended criminal code of his own, making innocent acts crimes punishable by fine or imprisonment without limit, at his discretion.

No extended discussion of what has been appropriately termed government by injunction or judicial government, can be indulged in this paper. The fact, however, that it is a device by which the citizen is deprived of the right of trial by jury, calls for a few brief observations.

The modern writ of injunction is used for purposes which bear no more resemblance to the uses of the ancient writ of that name than the milky way bears to the sun. Formerly it was used to conserve the property in dispute between private litigants, but in modern times it has taken the place of the police powers of the state and nation. It enforces and restrains with equal facility the criminal laws of the state and nation. With it the judge not only restrains and punishes the commission of crimes defined by statute, but he proceeds to frame a criminal code of his own, as extended as he sees proper, by which various acts, innocent in law and morals, are made criminal; such as standing, walking, or marching on the public highway, or talking, speaking or preaching, and other like acts. In proceedings for contempt for an alleged violation of the injunction the judge is the

lawmaker, the injured party, the prosecutor, the judge and the jury. It is not suprising that uniting in himself all these characters he is commonly able to obtain a conviction. While the penalty which the judge can inflict by direct sentence for a violation of his code is fine or imprisonment limited only by his discretion, capital punishment may be inflicted by indirection. All that seems to be necessary to this end is to issue a writ to the marshal or sheriff commanding him to prevent a violation of the judge's code, and then the men with injunction nooses around their necks may be quickly dispatched if they attempt to march across this injunction deadline. It is said the judge does not punish for a violation of the statutory offense but only for a violation of his order prohibiting the commission of the statutory offense. Such reasoning as this is what Carlyle calls "logical cobwebbery." The web is not strong enough to deprive the smallest insect of its liberty much less an American citizen.

The extent and use of this powerful writ finds its only limitation in that unknown quantity called judicial discretion touching which Lord Camden, one of England's greatest constitutional lawyers, said: "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every crime, folly and passion to which human nature is liable." Mr. Burke pointed out the danger of investing "any sort of men" with jurisdiction limited only by their discretion. He said; "The spirit of any sort of men is not a fit rule for deciding on the bounds of their jurisdiction; first, because it is different in different men and even different in the same at different times, and can never become the proper directing line of law; and next because it is not reason but feeling, and when once it is

irritated it is not apt to confine itself within its proper limits."

It is a curious and significant fact, that the reasons given for conferring on federal judges the police powers of the state and denying to accused persons the right of trial by jury, are precisely those given for the establishment of the Court of Star Chamber. Summed up in a few words, the reason for its creation as expressed in the preamble of the act of Parliament was to secure the certain and speedy punishment of all persons who in the opinion of the court deserved punishment, and to this end the court was invested with a large measure of the jurisdiction and discretion exercised by federal chancellors in our day, and a trial by jury denied. Learned, able and honest judges sat in that court, but never a jury. History records the result. Its methods grew to be as cruel and pitiless as those of the Inquisition itself; it would have put an end to the liberties of the English people if it had not been abolished. "Had there been no Star Chamber," says a distinguished English writer, "there would have been no rebellion against Charles I." The lesson taught by the history of the Star Chamber is that the rights and liberties of the people will not long survive in any country where the administration of the law is committed exclusively to a caste endowed with boundless discretion and a long term of office, no matter how learned, able and honest its members may be.

Every student of history knows that most of the sufferings and oppressions which mankind has had to endure were the work of honest and able, but misguided or ambitious men. Honesty and ability do not exempt from error, and when coupled with error they become dangerous gifts. After all, the human skull is but the temple of human errors, and judicial clay, if you analyze it well, will be found to be like all other human clay. The rule is without exception that whenever the

exclusive power of making or administering the law is committed for any extended period to a single man or a few men—to a caste—the progressive restriction of the liberty of the people follows. The bond of sympathy between them and the people grows steadily weaker until the rights of the people are forgotten and the protection and interest of caste and classes become their chief concern.

We pass from the right of trial by jury to its utility and value. Its immense superiority to any other mode of trial in criminal cases is indisputable. The criminal law is crude and arbitrary. The discrimination essential to distinguish between crimes dangerous to society and those not so cannot always be formulated into a written rule. Human intelligence and foresight are not equal to the task of conceiving, and the English language is not adequate to express the nice distinctions and varying qualities in human actions. They depend upon the environments, age, temperament, education, motive and many other things which can be applied to the particular case by a jury only.

The law takes no note of moral justification, but only legal. It remains so for two reasons—one is the difficulty already mentioned of defining with precision the cases for the application of the principle of moral justification or retributive justice; and the other is the knowledge that the jury, owing to their peculiar constitution and representative character, have power to and will supply this defect. A jury will convict the assassin, but not the girl who kills her seducer; they will convict the man who murders for money, but not the man who kills the invader of his home; and when a hundred good men, overcome with virtuous indignation by the atrocious crime of some savage brute, do execution upon him without the forms of law, the jury will not hang the hundred good men for accelerating the outlaw's pun-

ishment. Cases arise in which to inflict the penalty of the law would be more dangerous to social order than to overlook the offense. Immunity to murderers generally would soon dissolve the bonds of society; but juries instinctively feel that the social bond is not weakened but rather strengthened by the death of a seducer at the hands of his victim. Representing as it does the immense justice of the people, the jury cannot be replaced by an individuality. Uninfluenced by circumstances of moral justification or retributive justice, and heeding nothing but the text of the law, the judge would be constrained to visit with the same penalty the assassin and the girl who slays her seducer, the man who murdered for money, and the man who killed the invader of his home, the savage brute who slew the victim of his lust, and the hundred good citizens who retired him from circulation.

The judge would have to do this, for he does not represent and cannot appeal to the immense justice of the people to justify him for departing from the text of the law. He could not avail himself of that elastic and equitable principle which juries can apply to the administration of criminal justice and without which no written criminal code could long survive.

By constitutional provision in most, if not all, of the states the jury is made the judge of the law as well as the facts in libel cases, and in some of the states they are the judges of the law in all criminal cases. It is sometimes asserted that the juries are responsible for the miscarriage of justice which occasionally takes place in criminal cases. As a rule the responsibility for such miscarriage will be found on the bench and not in the jury box. Observation teaches us, and the law reports prove, that ten guilty men escape through the errors and mistakes and technical quibbles of the courts for one who escapes through an error of the jury. One

of England's best and ablest judges, Lord Chief Justice Denman, said:

> It is a grateful task to bear testimony to the excellent conduct of juries at the Old Bailey sessions. I don't remember a single conviction that appeared to be unjust. Some acquittals have startled me; but often very good reasons, which had not occurred to me at the trial, have been suggested afterwards, and I have often thought that their mistakes might be traced to their feeling too much deference for certain vulgar scraps of judicial phraseology which have come to be considered as principles of law.

Who is responsible for these "vulgar scraps of judicial phraseology," that do sometimes mislead and frighten a jury into an erroneous verdict?

The superiority of the jury as judges of facts is as marked in civil as it is in criminal cases. Moreover, the consequences of an erroneous verdict by a jury are immeasurably less than an erroneous verdict by the judge; for one jury is not bound by the error of a former jury, but the law of precedent will compel the judge to adhere to his error, for it is a rule of fixed tribunals that consistency in error is to be preferred to a right decision.

Lord Brougham, who possessed that noble characteristic of the profession, the courage to defend the defenseless against the strong—even a friendless woman against a powerful king—recognized the great superiority of the people as judges of the facts, and after long experience in courts of law and equity, and on the bench as well, declared that trial by jury "should be applied to those cases from which the practice in equity has excluded it; and that improvement would be best effected by drawing to it the cases which the courts of equity have taken from the common law, and which they constantly evince their incapacity to deal with by sending issues to be tried whenever any difficulty occurs."

It is said juries are inferior to the judges in point of learning and ability. In the affairs of life much that is called learning is of little utility. Dr. Holmes says:

> How small a matter literature is to the great seething, toiling, struggling, love-making, bread-winning, child-rearing, death-awaiting men and women who fill this huge, palpitating world of ours.

Men may be oracles in the arts and sciences, and infants in the affairs of life.

Job says, "Great men are not always wise," and there is nothing truer in the *Book*. It is out of the question that one man whose whole existence is devoted to one occupation, can know as much about men and affairs—and that is the kind of knowledge that is wanted in the settlement of controversies among men—as twelve men of affairs engaged in varied pursuits and occupations. Judges, as judges of the facts, have all the faults, but not all the virtues of juries. Lord Hobhouse in an address showing the necessity for jury trials said:

> It seems to me that juries have kept our laws sweet; they have kept them practical; they still do so; they are like the constant, unseen, unfelt force of gravitation which enables us to walk on the face of the earth instead of flying off into space. Certainly nothing can be more important to the welfare and coherence and strength of the nation, than that its laws should be in general harmony with its convictions and feeling. . . Juries are passing every day innumerable decisions, each of them very small, but constant, ubiquitous, and tending to carry superfine laws down into practical life so as to make them fit for human nature's daily food.

The idea here expressed by the learned lord is conveyed in the homely old maxim of the farmer, that when the fodder in the rack hangs too high for the cattle, the fodder must come down or the cattle will starve. The tendency of judges in the absence of juries would be to hang the fodder in the rack too high for the cattle.

It is said jury trials protract litigation, but the errors that lead to new trials, and appeals and writs of error and the reversals of judgments and protraction of litigation are the errors of the judges. Look into the reports and you will find that in the trial of commonplace cases the trial court is charged with the commission of from five to fifty errors of law, and frequently convicted on

some of the charges. And the errors of judges are not limited to the courts of original jurisdiction. The appellate courts themselves are constantly falling into error. If one is curious to know the extent of these errors let him consult Bigelow's *Overruled Cases,* where he will find that the appellate courts as far back as 1873, had overruled nearly ten thousand of their own decisions. How many they have overruled since that time is not known. These are their confessed errors only; there still remain, we know not how many errors not yet confessed, for judges are like all great sinners —never confess their errors until *in extremis*—and not then with that openness, fulness, and frankness supposed to be essential to insure spiritual salvation to a sinner.

In a volume of the reports of the Supreme Court of Nebraska is an official list of one hundred and eleven cases previously decided by that court which have been overruled by the same court.

On one great line of questions the opinions of the Supreme Court of the United States have for some time swung back and forth with the regularity of a pendulum, so much so that a distinguished lawyer recently remarked that when he had one of that line of cases he felt sure of winning it if the last case decided by the court was against him.

And yet in the light of these facts there are those who affect to regard a court as a fetish and assert that the opinions of judges are exempt from criticism, and that they are not amenable in any degree to an enlightened public opinion strong and forcible enough to compel attention even from an absolute monarch. Judges are not popes and their decrees are not infallible.

Judges make hundreds of mistakes in deciding the law where the jury makes one in deciding the facts; and when juries do err, it is commonly owing to the mistake of the judge in instructing them erroneously or inconsistently on the law. When the judges learn to

decide the law with as much accuracy and fidelity as juries do the facts, it will be time enough for them to indulge in censorious criticism of the jury for their supposed mistakes. Such action is not only a gross invasion of the rights of the jury, but it is an invasion of the constitutional rights of the suitor who is entitled to have a jury in the box who will not be influenced in any degree in the honest and independent exercise of their own opinion by fear of censure, or the hope of applause from the judge. The free, independent mind has one opinion, and the trammeled, dependent mind another opinion; and the free, independent mind is what every suitor is entitled to have in the jury box.

To conclude: For a free people, "trial by judge and jury" is immensely superior to any other mode of trial that the wit of man has ever yet devised, or is capable of devising; and evil will be the hour for the people of this country when, seduced by any theory, however plausible, or deluded by any consideration of fancied emergency or expediency, they supinely acquiesce in its invasion or consent to its abolition.

JURY SYSTEM—DEFECTS AND PROPOSED REMEDIES [2]

I was asked to speak upon the jury system and the various proposed remedies of its defects. But its chief defect can only be cured by its entire abolition—the defect of humanity. For of all earthly institutions the jury is the most human—twelve times as human as a single judge—and created for that very reason. If you consider the matter impartially the wonder is not that the jury system is not better, but that it is not worse. How can that extraordinary conglomerate of ignorance,

[2] From article by Arthur C. Train, Esq., former assistant district attorney of New York City. *Annals of the American Academy.* 36: 175-84. July, 1910.

sentiment, prejudice, insanity and anarchy known as the jury be productive of justice? How can the Irishman administer justice to the negro, the Christian to the Jew, the Republican to the Democrat? How can any good thing come out of that sort of a Nazareth? Frankly speaking, how many of you would really care to be judged by any twelve of your own immediate friends? You would be sure to remember that this one had too hot a temper, that one ineradicable bias, that another was eccentric, that a fourth had an uncle in an insane asylum, and that the rest were a little queer anyway. Yet how vastly preferable they would seem to any jury of your peers which would be drawn out of the wheel by a clerk of sessions! Still you would probably get justice. I once had a jury composed of four saloon keepers, three delicatessen men, a junk dealer, an impressionist artist, one cab driver, one grave digger and a lecturer on the Holy Land—and it was one of the best juries I ever had. It is stated on good authority that Recorder Smyth, of New York, once said that he had never known a jury over which he was presiding in a criminal case to return a wrong verdict. That is high praise for a system popularly described as a broken-down failure. Why should a jumble of unintelligent Americans of foreign birth, most of them of a rather low personal standard of business morality, render impartial and honest verdicts from a jury box? I answer, for the same reason that the common people of this country have never yet failed to respond to any appeal based on morality or justice. Because with all our failings this nation is essentially a moral nation with high ideals of honor and public duty—often, I regret to say, better exemplified in the humble service of the juryman than in our legislatures and municipal office holders.

Now, inasmuch as the chief defects of the jury system are inherent in its very nature, it is well to have in mind the purposes for which it was devised. We

should remember that the jury was instituted and designed to protect the English freeman from tyranny upon the part of the crown. Judges were, and sometimes still are, the creatures of a ruler or unduly subject to his influence. And that ruler neither was nor is always the head of the nation; but just as in the days of the Normans, he might have been a powerful earl whose influence could make or unmake a judge, so today he may be none the less a ruler, if he exists in the person of a political boss who has created the judge before whom his political enemy is to be tried. I have seen more than one judge openly striving to influence a jury to convict or acquit a prisoner at the dictation of such a boss who, not content to issue his commands from behind the arras, came to the court room and ascended the bench to see that they were obeyed. Usually, the jury indignantly resented such interference and administered a well-merited rebuke by acting directly contrary to the clearly indicated wishes of the judge. Wealth and influence are no less powerful today than they were in the days of the barons, and our liberties no less precious. It is frequently said that there is no longer any danger that an innocent man will be convicted, but that the difficulty now is to prevent the acquittal of the guilty. This is, broadly speaking, true. But a system which would permit the conviction of an innocent man in a civilized country would be intolerable. Yet, without a jury such might easily be the case in any city of the United States.

Imagine the shock to our sense of justice, if Joseph Pulitzer, the proprietor of the *New York World*, could have been extradited to Washington during the last administration and, before a criminal judge, appointed by the executive, and in the shadow of the White House, tried for a libel upon the President's brother-in-law without a jury. It was to protect themselves against such possibilities that the barons forced King John to ack-

nowledge the right to local courts and jury trial as set forth in Magna Charta.

The time has not yet come in the United States when our liberties would be safe without the jury.

It is inconceivable that an institution so interwoven with our ideas of popular government should be displaced. Even if there were substituted for it some more accurate method of administering the law in criminal cases, it might well be that what we gained in efficiency we should more than lose in the illustration of the principles of republican government.

Just why there should be so much criticism of the jury I have never been able to understand. Assuming that the system is an essential element in our form of government, is the jury any less successful than any other of its branches? You do not hear any tirades against the defects of presidents, governors, legislators or police captains *as a class* or as a feature of our government. They are accepted as necessary evils. There are no societies for the improvement of mayors of cities or the training and discipline of United States senators. We take them as they are, simply because we know that they are human, like the rest of us. Is the justice administered by our juries less admirable than that of chief executives or of local judges or police magistrates? Probably not.

That brings us to the consideration of just what kind of justice is administered by the jury. My opinion, after trying several thousand criminal cases before between eight thousand and ten thousand jurymen, is that the system is in excellent working order. I do not know anything about Philadelphia juries; my experience is limited to New York County and what I have been told about Massachusetts and New Jersey. I dare say that in the country districts juries are more complacent than in the big cities. They are apt to be friends of the man at the bar and more anxious about not hurting his feel-

ings than if he were a stranger. Taken on the average, as all our institutions should be judged, I believe that, whatever the individual faults of jurymen may be, once sworn and in the box, they become a highly conscientious body of men. I do not think that lawlessness is an attribute of American juries as a class any more than it is of judges, presidents or district attorneys.

If, four times out of five, a judge rendered decisions that met with general approval he would probably be accounted a highly satisfactory judge. One cannot be right every time. Now, out of every hundred indicted prisoners brought to the bar for trial, probably fifteen ought to be acquitted if prosecuted impartially and in accordance with the strict rules of evidence. In the year 1908, the last statistics available, the juries of New York County convicted in 68 per cent of the cases before them. If we are to test fairly the efficiency of the system, we must deduct from thirty-two acquittals remaining the fifteen acquittals which were justifiable. By so doing we shall find that in the year 1908 the New York County juries did the correct thing in about eighty-three cases out of every hundred. This is a high percentage of efficiency. Is it likely that any judge would have done much better? Is a judge, devoting his time exclusively to the law, as well qualified to pass on the probabilities of a situation as twelve men of affairs? Or is a single judge less likely to yield to popular clamor than a jury whose identity is lost the moment the trial is over?

Of course, as murder is the most sensational of crimes, it is not surprising that the jury system is usually judged by its effectiveness in that particular class of cases, and it is true that the percentage of convictions is from 15 to 20 per cent less than in other varieties of crime. The reasons for this, however, are clearly apparent.

First, It is much more inherently improbable that a man or a woman is bad enough to kill another than that he or she will accept a bribe or get married too many times.

Second, A jury always demands proof almost mathematically convincing before convicting a prisoner of a crime punishable by death, and practically discards the reasonable doubt proposition. There must be *no* doubt in a murder case, whereas they will convict a pickpocket almost on suspicion.

Third, The law of self-defense is exceedingly broad, not to say ambiguous, and it is the inevitable plea of the murderer.

Fourth, Murder cases attract a far higher degree of ability to their defense; and,

Fifth, But first in importance, the chief witness is always absent, having been conveniently removed by the very crime for which his assassin is on trial. Thus we should not expect to convict as often in murder cases as in others.

I believe that the ordinary New York County jury finds a correct general verdict four times out of five. But all juries go wrong occasionally, just as anybody else does. Wilfully, or by mistake, they sometimes render verdicts deeply shocking to our sense of justice. Such performances are widely heralded in the press, for a sentimental acquittal makes a great "copy." But there are many verdicts popularly regarded as examples of lawlessness, which, if examined calmly and solely from the point of view of the evidence, would be found to indicate nothing of the kind, but, on the contrary, to be the reasonable acts of honest and intelligent juries.

One side always gets licked in every lawsuit. There will always be some persons who think that every defendant should be convicted, and feel aggrieved if he is turned out by the jury. Yet they entirely forget in their displeasure at the acquittal of a man whom they instinc-

tively *"know"* to be guilty, that the jury probably had exactly the same impression, but were obliged, under their oaths to acquit him because of an insufficiency of evidence.

It may be unfortunate that the cases attracting the most attention are not always the strongest, but a sound opinion as to whether the juries in these or any other cases acted reasonably or not would necessitate a complete knowledge of the evidence and of the particular phases of the law applicable to it. About half the public are dissatisfied in any event, no matter whether the defendant be acquitted or convicted. These will always agree that justice has not been done, although 90 per cent of the most emphatic have only a hazy knowledge that somebody has killed somebody else.

Occasionally, to be sure there occurs a fiasco of justice. But such verdicts are the exception and not the rule, and for every such lawless jury there are a dozen others who obey their oaths and do their duty, however unpleasant it may be. As a matter of record, however, juries usually convict in "star" or celebrated cases. Thus, in the last ten years in New York County, with but two or three exceptions, there has been a constant series of convictions in important trials in which at the time the public was deeply interested.

My own observation leads me to believe that in those parts of this country where the people want an efficient jury system, they get it. To demand a human institution that will always work perfectly would be tantamount to demanding perfect humanity. You will have good governors and all-wise presidents just so long as you want them, and the same is true of the jury. They are all part of what we regard as successful republican government. There is no constructive ingenuity capable of devising a form of government in which only perfect men can be chosen to office. Thus, whatever de-

fects there are reside in the officeholders and not in the office itself.

Now, the jury is here to stay, and, it seems to me, works rather better than could be expected. Of course, it has defects, and some of them could be easily remedied. Many so-called defects are not defects at all. For example, you hear a great deal about the difficulty of compelling intelligent and capable men to serve, and how only the rabble are left upon our juries. Well, I for one, believe more in the honesty and ability of the rabble who are willing to do their duty than in that of the so-called gentlemen who successfully evade it.

I have no use for the prosperous citizen who is too good for jury duty—too clean and too comfortable to get down into the jury box with his grocer and his plumber and do some work. I can get along without him entirely. He is the same soft chap that hires another fellow to go to war for him, while he stays at home and makes money out of a government contract. We do not want as jurors the type of men who have so little interest in the community that they do not even vote. I had rather take an immigrant, five years off Ellis Island, who has some pride in being an American, and trust my liberty to him, than to a Fifth Avenue or Walnut Street swell who is bored to death with everything in general, and anything pertaining to politics and government in particular. We can get on without the gentlemen as jurors, if we can get the men. Some of the worst jurors I ever had belonged to my own clubs in New York. The fellows I like to get as jurors are master carpenters, masons, contractors, engineers, who have had experience of real life, are glad to be alive right here in the United States and are interested in the place. If we do not get enough of this type of men on our juries it is probably because we have not enough of them anyway. There are no laws that will put public spirit into a moral dead beat.

Of course, we should encourage every citizen to do his duty. Service as jurymen should be regarded as an honor and a distinction, not as a curse. We should pay our jurors well for their loss of time. The two main practical objections to the present methods of conducting jury trials seem to me to be the unconscionable delay involved in the selection of talesmen and the fact that unanimity is required. In New York the prisoner can arbitrarily challenge the first twenty talesmen called against him if he is charged with a crime punishable by a term of more than ten years. This number is increased to thirty in murder cases. When the prisoner's lawyer demands an individual examination of talesmen the selection of the jury usually takes as long or longer than the actual trial. I will guarantee to delay any serious criminal trial for two whole days selecting a jury—provided I get a reasonable fee. It is all guesswork anyway. The number of arbitrary challenges should be summarily reduced to from three to six. With a little more care in the original selection of our panels there would be slight risk involved to either side in accepting the first twelve men that filed into the box.

As to the number which should be necessary to a verdict, I do not, personally, see why we should demand an unanimous verdict. We do not require it anywhere else. There is today no particular sanctity in the number "12," whatever may have been the feeling in ancient times. The reason for having twelve jurymen is conclusively explained in Duncomb's Trials *per Pais*:

> And first as to their number twelve: and this number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us on our eternal state, good reason has the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve and Solomon's officers were twelve. Therefore not only matters of fact were tried by twelve, but of ancient times twelve judges were to try matters in law, in the Exchequer chamber, and there are twelve counsellors

of State for matters of state; and he that wageth his law must have eleven others with him who believe he says true. And the law is so precise in this number of twelve, that if the trial be by more or less, it is a mis-trial.

Much of the seeming misguidedness of juries in criminal cases is due, just as it is due in civil cases, to the idiosyncrasy, or the avowed purpose to be "agin' the government," of a single talesman. In an ideal community, no matter how many persons constituted the jury, provided the evidence was clear one way or the other, the jury would always agree, since they would all be honest and reasonable men. But just as a certain portion of our population is mentally unbalanced, anarchistic and criminal, so will be a certain portion of our jurors. In addition to these elements, there will almost invariably be found some men upon every panel who are so obstinate, conceited and overbearing as to be totally unfit to serve, either from the point of view of the people or the defense. It is enough for one of these recalcitrant gentlemen that eleven other human beings desire something else. That settles it. They shall go his way, or not at all.

Some allowance should, therefore, be made for the single lunatic or anarchist that gets himself drawn on about every fifth jury, for if he once be empanelled a disagreement will inevitably follow. This could be accomplished by reducing the number necessary for a verdict to eleven. Hundreds of juries have been "hung" by just one man. It would be an excellent thing to have an additional, or thirteenth, juror sworn to take the place of any one of the others who might fall sick or die during the trial. Such reforms as these easily suggest themselves.

But I believe that the way to elevate the jury system is to elevate the bench. With strong and capable men to guide them, juries would rarely go wrong. The chief obstacle to the administration of justice today is the in-

terference of the sensational press, which arouses the sympathy and stimulates the imagination of the reader, not only by exaggerated and falsely accentuated accounts of the testimony, however filthy and revolting, but also by running column after column of matter not drawn from the evidence at all and calculated to inflame the mind of the public and, through it, the jury. In view of this deliberate perversion of truth and morals the euphemisms of a hard-put defendant's counsel when he pictures a scullery maid as an angel, and a coarse bounder as a St. George, seem innocent indeed. They are, in fact, only rendered possible by the antecedent cooperation of the "sympathy brigade," of "special" writers, and the staff of instructed reporters, who, with one common purpose and in accordance with the policy of their editor or proprietor, blacken or canonize the dead and extol or defame the living.

It is not within the rail of the courtroom, but within the pages of these sensational journals, that justice is made a farce. The phrase, "contempt of court," has ceased practically to have any significance whatever. The front pages teem with caricatures of the judge upon the bench, of the individual jurors with exaggerated heads upon impossible bodies, of the lawyers ranting and bellowing, juxtaposed with sketches of the defendant praying beside his prison cot, or firing the fatal shot in obedience to a message borne by an angel from on high.

Imagine, if you can, a defendant in a murder case reporting his own trial for a daily paper, and giving his own impressions and explanations of the evidence, with the jury at liberty, if they see fit, to read every word! Small wonder that curious and morbid crowds struggle for access to such supposed scenes of mingled hilarity and pathos, or that jurymen are occasionally led to believe that their verdict should be but the echo of "public opinion" as expressed in the columns of the press. How

long would the "unwritten law" play any part in the administration of criminal justice if every paper in the land united in demanding not only in its editorials, but upon its front pages, that private vengeance must cease?

In conclusion, let me revert to my original proposition. The defects of the jury system are the defects of human nature. The stream cannot rise above its source. The jury system works the exact justice which public opinion demands—no more and no less. As we grow to have a greater respect for human life and a higher regard for law and honesty, the verdicts of our jurors will keep pace with public sentiment. The day will come, in fact it seems to be breaking just about this time, when dishonesty in business and graft in politics will lead to the cropped head and the ball and chain as certainly as burglary and rape. As we grow in age and in grace, juries, like all public officers, will perform their duties conscientiously and accurately; they will uphold the laws, unmoved by prejudice or sympathy, they will be unaffected by popular sentiment or fear of newspaper disapproval; they will be perfect examples of a perfect system of government. But then there will be no need for juries—for there will, of course, be no criminals.

TRIAL JURY[3]

The right of trial by jury, as it now exists, should remain forever inviolate as the present Constitution declares, and all the proposed changes should be rejected, especially the proposition to abandon the rule of unanimity which seems to meet with favor in some quarters.

The jury system as it has existed for ages is so fixed as an essential part of our political institutions; it

[3] From letter of Honorable Joseph H. Choate, submitted to the Constitutional Convention of the State of New York, Albany, June 19, 1915.

has proved itself to be such an invaluable security for the enjoyment of life, liberty and property for so many centuries; it is so justly appreciated as the best and perhaps the only means of admitting the people to a share, and maintaining their wholesome interest, in the administration of justice; it is such an indispensable factor in educating them in their personal and civil rights; it affords such a schooling and training in the law to the profession itself; and has been so long imbedded in our constitutions, federal and state, that I do not believe that the people of the state of New York will ever consent to give it up or to change it.

I feel certain that to give up the rule of unanimity, and to make the votes of a majority or anything less than the entire twelve sufficient for a verdict, in cases criminal or civil, would secure the defeat of the whole work of the convention at the polls.

In the days of the Stuarts the trial by jury was a defense to the innocent, against oppression by the monarch, but today the citizen needs protection against a more powerful oppressor than any of the Stuarts ever were. I mean the oppression of an unbridled democracy or, what is still more dangerous, oppression by an indigant press. Of recent years the administration of justice has been largely usurped by the newspapers, which from the moment a crime is committed, or any important controversy of a civil nature arises, enter upon a discussion of the matter, and practically pronounce their verdict upon it before the court and jury have a chance, so that when these take up the matters for consideration it is very hard for them to resist the unanimous or general voice of the press. The decisions of our Court of Appeals will show cases where the court of first instance, and even the intermediate courts have been carried away by this popular pressure and it was only when the case reached the court of last resort, that a fair and unbiased decision was reached, revers-

ing the courts below. I believe that a jury of twelve honest and intelligent men is the best possible tribunal for resenting and resisting such illegitimate pressure from the press.

I do not understand that there is any desire to change the present rule in capital cases where the life of the prisoner is involved, but there are interests far dearer than life, which are involved in a trial of criminal cases not capital. There has been a sort of mania of recent years for government by indictment, and upon the charge of conspiracy in various forms, so easy to make and so difficult to defend, men's characters, which they value as more precious than life, have been assailed and defamed, often, as I believe, without cause, and in many cases it is the brave dissent of one or three of the twelve jurymen, that saved the victim of popular or governmental oppression from undeserved conviction.

There has been a strange perversion in recent years of the true nature of the functions of the prosecuting officer, who used to be regarded and should properly be regarded as a semi-judicial officer, having a large discretion, and no selfish personal interest, in the prosecution of offenses committed. But of late it has come to be regarded as a purely political office, and a proper field for the winning of personal fame by the incumbent at the expense of the accused, and there is a suspicion at least, that prosecutions are sometimes sustained by publicity bureaus, doubtless of spontaneous origin and growth, which create public sentiment against the accused in advance of the trial, so as to deprive him of a fair chance. Against this novel form of oppression, a jury of twelve, of whom a unanimous vote is required, is the only possible safeguard—and even that sometimes fails—so eager are some of these political officers to win distinction and promotion by the number of scalps at their belt.

Accepting the rule, which all agree to, that a defendant's guilt must be established beyond all reasonable doubt before he can be convicted, it is hard to see how, as long as two or three or one honest man on a jury has a reasonable doubt, the prisoner can justly be deprived of the benefit of it, without destroying our cardinal rule. I have no fear, therefore, that there is any danger of trial by jury in criminal cases, as it now exists, being supplanted in the confidence of the American people, nor has any possible substitute for it ever been seriously suggested.

No! It is for the integrity, efficiency and utility of trial by jury in civil causes that I am chiefly concerned, and would most earnestly plead today with my professional brethren who make up a vast majority of this convention, and are naturally responsible for public sentiment of the subject.

For I cherish as the result of a life's work nearing it's end, the belief that the old-fashioned trial by a jury of twelve honest and intelligent citizens instructed by an upright and learned judge remains today, all suggested innovations and amendments to the contrary, the best and safest and surest method for the determination of facts, as the basis of judgment of courts, and that all attempts to tinker or tamper with it should be discouraged as disastrous to the public welfare.

The weakness of trial by jury as it now exists does not lie with the twelve men in the jury box, if they are properly selected for the service from the great body of responsible citizens as they ought to be. The first and most essential element in a jury trial is a wise, learned, impartial and competent judge. Add to the ordinary modicum of legal learning, courage, honesty and common sense, and you have the kind of a judge I mean. I believe that in the state at large, outside of the city of New York, the present system works perfectly well, the judges are competent and the jury

represents the average intelligence and character of the community, but in the city as everybody knows, some judges neither appointed by the governor nor really elected by the people, but selected by party machines, without regard to merit and fitness, are called upon to preside over jury trials, for which service they are wholly unfit, and their charges sometimes amount to little more than saying to the jury, "If you believe the witnesses for the plaintiff you will find for the plaintiff; if you believe the witnesses for the defendant you will find for the defendant." The convention must find some means of curing this evil, and of limiting the selection of judges to properly qualified, learned and competent men. The education of judges on the bench by years of service is altogether too costly. Let us have no more of it.

And then there is another evil, still more glaring, and that is that jury duty is somehow or other escaped by the great mass of responsible citizens, men of character and property and suitable knowledge. I am speaking of the state courts. By the present wide range of exemptions and the loose habits of the courts in excusing men who ought to serve, the list of jurors summoned and secured for the service, instead of being made up of the best men in the community, seems to be composed, at the best, of a miscellaneous collection snapped up haphazard from the pages of the city directory. It is in the power of the convention to cure this evil, and it will fail in its duty if it does not accomplish that result. The Federal Courts exhibit a splendid contrast to this state of things, I mean in the city of New York. The judges, being appointed for life by the President, are of the highest quality and character, and the *juries*, both of the grand jury and petit jury, are selected with care from among the best citizens and I have heard no complaints of the trial by jury in the federal courts in New York.

The one objection that I have heard to the rule of unanimity, which requires the entire votes of the twelve to render a verdict, is the occasional inability of juries to agree upon a verdict at all. But this is a comparatively infrequent event, and so far as the imperfect statistics which I have been able to gather show, only about 3 or 4 per cent of all jury trials end in a disagreement. Of these cases, many are so doubtful and so difficult that the disagreement of the jury, instead of being a disaster, is a positive good, as leading the parties to such a compromise as they ought to have made before carrying the case into court, or, if that fails, in giving an opportunity for new light and reconsideration.

Where very great amounts are involved and the contest is extremely close, and those are the cases in which the largest percentage of disagreements occur, a second trial is not an unmixed evil. It certainly is better than a wrong decision. The truth is discoverable, of course, in every case, but how often on the first trial in such cases is some evidence omitted or misunderstood from lack of preparation or of knowledge which, being cleared up on the second trial, makes the truth more obvious and discernable.

True, there is an occasional crank on a jury, who wrongfully prevents a verdict by unreasonably refusing to agree; but these cases are very rare and are almost as likely to happen with a jury requiring eleven or ten or nine votes for a verdict as with a jury requiring twelve. And, so far as my experience and observation go, the disagreement of the jury, when it does happen, is quite as likely to be the fault of the judge as of the jury. If the judge is too ignorant or too lazy to perform his most important part of the duty in a jury trial, namely, to explain to the jury the proper legal bearing of the evidence upon the issues of fact, which it is their sole province to decide, they may very nat-

urally be unable to agree. Juries are, as a rule extremely jealous of their province of deciding the facts, and anything like partiality by the judge very properly tends to excite their alarm. I once had a case which had to be tried three times. It was a speculative case for damages. The tort was plain enough, but the question was how much damages. On the first trial the judge charged so strongly for the plaintiff, and on the second trial another judge charged so strongly for the defendant, that in both cases the jury, instead of taking an average verdict, which is the common way to reach a verdict at all, revolted and disagreed. And nine or ten or eleven if they had had the power to pronounce a verdict, would have been just as likely to do so.

And let me say again, upon the same authority of personal experience and observation, that for the determination of the vast majority of questions of fact, arising upon the conflict of evidence, the united judgment of twelve honest and intelligent laymen, properly instructed by a wise and impartial judge, who expresses no opinion upon the facts, is far safer and more likely to be right than the sole judgment of the same judge would be.

Mr. Justice Miller, one of the wisest judges that ever sat in the Supreme Court of the United States, said:

> An experience of twenty-five years on the bench, and observation during that time of cases which came from all the courts of the United States, for review, as well as all cases brought before me at *nisi prius*, have satisfied me that when the principles above stated are faithfully applied by the court in a jury trial, and the jury is a fair one, as a method of ascertaining the truth in regard to disputed questions of fact, a jury is in the main as valuable as an equal number of judges would be, or any less number. And I must say that in my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges came

to an agreement on a question of law, and how often they disagreed upon questions of fact which apparently were as clear as the law.

What I regard as a fatal objection to dispensing with the rule of unanimity and permitting the decision of a majority, or of two-thirds, or three-quarters of a jury to control is the certain danger of hasty and therefore unjust and extravagant verdicts. The rule so long insisted upon by the English and American people, that the right to property or money in question shall not pass until the whole jury is satisfied, by the clear preponderence of evidence, that it ought to pass, is not too great a security by which the sacred right of property ought to be held.

The right of property, as Mr. Webster said at Plymouth in 1820, is the corner stone of civil society, and its sanctity cannot be safely invaded or impaired. I think it is seldom that a majority of the jury on the first ballot do not agree, and if you make their voice or that of less than the twelve decisive, you will have a hasty verdict; while experience has shown that intelligent discussion in the jury room is just as effective as it is anywhere else, and often results in converting the majority to the real truth. The prejudice of jurors, so far as it affects their conduct, is always and naturally for the weak against the strong; for the poor against the rich; for the individual against the corporation; and it sometimes sways the whole to the very verge and often beyond the verge of injustice, and if you break down the barrier which lies in the rule of unanimity, and which has heretofore been only the sufficient safeguard of property, you will be likely to cause a great deal more injustice than you will cure by such a change.

Imagine a jury aroused to even just indignation by the oppression or misconduct of a rich individual or great corporation against an individual plaintiff, and not restrained by the cooler sense and judgement of the three

or four most conservative and intelligent of their members, and you can easily foresee what havoc they would make with the rights of property.

The great contests in the courts in the coming generation are likely to be against and in the defense of the right of property, and I can conceive of no more destructive and fatal weapon which its adversaries, who are getting to be numerous as they are fanatical, could secure in advance, than the abolition of the rule of unanimity excluding practically the votes of the more conservative, the more deliberate, the more just members of the tribunal.

Another charge against the common law trial by jury is to accuse it of a great share in the law's delay, but I deny this charge absolutely and altogether. There is nothing in the whole realm of litigation so short, so sharp and so decisive as the ordinary jury trial. As compared with the abominable system of references, which is the practical substitute for it, a trial by jury is an infinitely quick mode of decision. These references hang for months and generally for years, and wear out the life blood of the parties. They pile up an accumulated mass of expense for the fees of lawyers, referees and stenographers, fatal to the patience and endurance of clients.

No, the charge of delay against juries and jury trials is wholly without foundation. There are alarming causes of delay between the commencement of an action and the final judgment, but which are not attributable to the trial by jury. The everlasting postponement of causes without reason, and the horrible code of procedure which now blocks the course of justice in New York, and the unnecessary delays before verdict and after it, before final judgment, are evils that it is within the power of this convention to prevent. These codes of procedure which have taken the place of a simple practice regulated by rules of court, have become so cumbersome and im-

possible, they afford and create such opportunities for delay and such countless preliminary motions, each a litigation in itself, that there seems no way out but to cut the Gordian knot, and return to the ancient practice, by abolishing the code of procedure. The other great causes of unnecessary delay lie with the judges and the lawyers and not at all with the jury, who from the moment they are impanelled proceed without interruption on their own part, save for necessary food and rest, to the hearing and decision of the case.

The proper functions of a judge in a jury trial were never better expressed than by Lord Bacon in his charge to Mr. Justice Hutton in handing him his commission to the Court of Common Pleas, "That you be a light to jurors to open their eyes and not a guide to lead them by their noses." I have attended many great jury trials in New York, presided over by great judges, such as Justice Nelson and Chief Justice Oakley and Judge Duer. When they charged the jury, having kept in their minds all the threads of the evidence from beginning to end whether the trial lasted a day, a week or a month, they stated clearly to the jury what the distinct questions of fact were upon which they were to pass, they then proceeded to go over the testimony and point out its application to those issues, and to instruct the jury by what rule and standard they were to measure the relative weight and credibility of conflicting pieces of testimony, in applying them to questions to be decided by them; and the result was that when the judge's charge was finished, the jury understood the case as they had never realized it until then, they understood what questions they had to decide and what material they had for making up that decision. How they should decide those questions was their own business and those great judges never presumed to suggest or interfere; and there is no doubt that that was jury trial according to the uniform course of common law both in England and America.

Find out a way to secure the appointment or selection of none but competent judges; abolish the exemptions now so absurdly extended as to excuse the most substantial citizens from service in the jury-box; and trust to the survival of the fittest advocates to conduct the proceeding, and you will have trial by jury again as it used to be, and as it ought always to have been—the safest, the surest and the speediest method of deciding questions of fact. Jury duty is a great political and public service, as much so as voting and military service, or the payment of taxes, and no fit man ought to be allowed to escape from the liability to perform it. I know how irksome it is; I know how thankless it too often appears to be but if our political institutions are worth saving, if this cardinal feature of free and popular government is to be preserved and transmitted entire, this peculiar form of public service must be performed by citizens fit for the duty; voluntarily, if they will, but by force of compulsion, if need be,

And so I would sum up in three demands in order to make trial by jury as nearly perfect as it ever has been or in the nature of things can be. First, take the selection of judges out of the hands of the bosses who permit the people to take no part in the selection, except to choose between two candidates each named by an irresponsible despot, who generally makes his choice for personal or party allegiance with just as much and just as little regard to merit and fitness as his own partisan necessities require or dictate; second, compel all responsible citizens who are fit and qualified for the service to take their turn in the jury box; and thirdly, abolish the code of procedure, which has already done incalculable harm to the administration of justice in our state.

The disposition by the convention of this great question of trial by jury, which I should most seriously deplore and regret, would be the proposed amendment by which the question should be left to the legislature to

determine at any time that a majority or two-thirds or three-quarters of the twelve may give a verdict which shall be binding without the consent or against the protest of the rest of the jury. This question, if any question ever was, is a strictly constitutional question, and not a matter for legislative disposition, dependent upon the varying whim or caprice of a legislature annually elected. It is fundamental, it is a cardinal feature not only of our bill of rights but of every bill of rights that has ever existed. You have recently been studying Magna Charta, and the proposition that the trial by jury shall forever remain inviolate is in it's nature exactly like those cardinal and elemental propositions which were imbedded in the Magna Charta, and have been reproduced and confirmed in every struggle for liberty that has taken place from that time to this. It is quite akin to the proposition that no man shall be deprived of life, liberty or property except by the judgment of his peers or by due process of law, and that justice shall never be sold, or denied, or postponed. To take it out of the Constitution, and to cast it upon the floating and fitful decision of an annual legislature would be, to my mind, a great derogation from the duty that rests upon the convention. If you wish to destroy or mutilate the trial by jury, which has been for so many ages a firm bulwark of popular rights, the convention must do it itself and not remit it to the legislative body, even for the sake of avoiding a fatal response from the people of the state upon it's whole work. It will be a very bold and defiant thing for the convention to do, but if they believe that it is right and necessary, they must do it themselves and not cast the responsibility upon the legislature. Trial by jury requiring the votes of all the twelve to make a verdict is one thing, a tribunal whose nature and working have been understood by all the people for ages, and is very dear to them; but this bastard tribunal of twelve, of whom seven or eight, or

nine, or ten may have the right to make a verdict without the consent or against the protest of the rest, is a wholly different thing, a tribunal unknown to the jurisprudence of England, of the federal government, and of New York—a pure experiment—which in my judgment the convention ought not to attempt to impose upon the people.

PRESENT-DAY JURY—A DEFENSE[4]

The inquiry arises, may we more reasonably expect a just result to be obtained by a bench of one or more judges than from a jury? The superiority of the jury is so clear and decisive that it is no wonder it has survived. Training and education are relative terms. No man, be he judge, juror, traveler or scholar, is trained to all specific problems that daily rise in human controversies. He may have the widest technical knowledge, the greatest personal acquaintance and knowledge of men and affairs, the longest experience of life, and yet, the first day he enters a jury box he may have presented to him for decision some problem with which he is wholly unfamiliar. If this be the case with the most accomplished juror, how much more with the average, the moderately well trained and educated man? He will find his own knowledge and experience entirely insufficient, and will be driven to the practice already long established, of calling in as witnesses those who are particularly qualified in the problems. All that is required of him is that he shall have a fair intelligence and an open mind to hear and consider what is laid before him; and of these two qualifications, the latter is, if possible, of more importance.

When we consider the different modes in which jurors and judges are selected certain advantages of the

[4] From article by Connor Hall, of Huntington, West Virginia Bar. *American Bar Association. Journal.* 10: 111-14. February, 1924.

former as triers of fact are immediately obvious. A judge is elected or appointed for a definite time, longer or shorter, for life or for years. He sits constantly trying case after case and is known as a man having power, before whom a given case will be brought. Jurors, on the other hand, are drawn from the body of the people for a single term of court; for a particular case a panel of only part of the whole number is drawn, and from these all partial or interested persons are excluded, and even afterward the parties have the right without question to strike off a certain additional number. They thus come to the case new, disinterested and unbiased. This difference in constitution gives a number of advantages:

First: The judge, if chosen for a term, is liable to political influence, from which the juror is wholly free; and if for life, he is more apt than a juror to become an oppressive instrument of government.

Second: The jury decides promptly. The judge may take the case under advisement and withhold decision for months or years.

Third: All courts and permanent tribunes tend to accept crystallized formulae and artificial concepts, so that the decision becomes more and more technical, while a decision from a body of laymen drawn each time from the people brings the decision back to an original sense of justice.

Fourth: The prejudices of one or more judges are worse than the prejudices of twelve men whose differing opinions are modified by those of their fellows.

It is not sufficient to prove that jurors are not perfect men or fitted to take part in the council of the gods on Mount Olympus. It is sufficient for the purpose of the case to show that they are better fitted to decide those particular questions than the judges we choose. And these latter, be it remembered, are not the ideal conceptions of the mere opposition. They are not the

just men in the dreams of the philosopher. He is a very human fellow, who may, and often in fact does, have a weather eye out for the opinion of the banker who holds his note, of the social leader to whose house he desires his wife or daughter to be invited, and, above all, of the voter, ever present in the gallery, and the low-brow political boss ever present to the mind's eye sitting on the side or sending his messages how such and such a litigant is a good friend of his, a good worker in the party, etc., etc. These are not mere imaginations. They are all too present an evil, and every lawyer, and every well informed man knows they are facts. Of course a great deal of litigation is not subject to such influence, but a great deal is, and in any event, when it comes to deciding questions of fact I would rather have an honest farmer, who holds no office and expects none, who knows none of the parties and cares nothing about any of them, who is simple, modest, unambitious and open-minded, than the average judge who may be, and often is, an honest, upright man, uninfluenced by personal or other considerations, but who may be and often is the reverse. The suspicion to which judges are subjected is often unjust, but be this said of the other man: he has been so chosen as to eliminate even suspicion.

Judges appointed for life or during good behavior are not ordinarily liable to political influence, that is, the political influence which arises from a desire for re-election. They are, however, subject to an influence which has often proved baneful, the desire to serve the government under which they hold office. The judge is, and soon comes to feel very keenly that he is, a part of the government engaged in enforcing its laws and establishing its peace. It is not wonderful then if he is found on the side of the government and against the individual. There is another influence to which he is subject, the influence of party. Before his selection

he was usually a party man, taking active part in political contests. He becomes imbued with the ideals and ambitions of the party. If at a time of crisis, as in a great war, or other period of excitement, the government finds it desirable to pursue a certain policy and that government happens to be in control of the party to which the judge belongs, he, however honest he might possibly be, is a dangerous tribunal to which an individual whom the government might be pursuing should submit his entire fate. It is particularly under such situations in criminal trials that the jury has proved the last refuge of freedom.

Perhaps the most serious of all objections to the judge as a finder of facts lies in this: that every sect, every profession, every particular calling tends to become crystallized into a narrow esoteric body. What were once fresh and original principles with the capacity for life and expansion, became hardened formulae. In short they become technical. For this reason we find that almost every generation for years has witnessed the passage of acts of legislatures, declaring that in the decision of cases the courts shall not be bound by form or method, but shall give judgment according to the very right of the cause. The act is passed. The legislature of the next generation passes a similar act, and so on generation after generation, all declaring in almost identical language that form shall be disregarded and judgment given according to the very right of the cause. Apparently all were equally futile.

All this is eloquent to the crystallizing, hardening, formalizing tendency of courts, and the repeated enactments of these statutes shows that in the judgment of the community this tendency has not been arrested by the repeated attempts of the legislature. And it is not strange; for in fact, acts of the legislature cannot arrest such growth. It lies in the very constitution of human nature, that the more it studies a particular subject, the

more it becomes interested in it, the more does it exclude other subjects and become narrow. Its conclusion of yesterday becomes a sacred formula of today. Everything comes to be tested, not according to broad general principles, but according to narrow concepts of the particular profession or art. The jury is the reverse. It is, as Hallam has so beautifully stated, like a pure fountain of justice constantly springing forth. They thus bring to the aid of the court those untechnical, fresh and original conceptions of justice and right which act as a constant corrective to the formalizing tendency of the court.

This brings us to the main objection to juries, that they are prejudiced. In the speculations of the philosopher the actual juror suffers in comparison with that hypothetical, perfectly intelligent, perfectly philosophical creature evolved from the consciousness of the dreamer. But he does not fare half so badly when compared with the money-borrowing, socially climbing, office hunting individual on the bench. Does not the latter, too, have his prejudices quite as fixed and detrimental as those of the juror? Caste is one of the hardest, most persistent facts in human nature. This prejudice, most felt by the upper members of society from whom the judge might come or to which he has come to belong and by which he might be moved, is an influence much more pernicious to the cause of justice than some rural notion that the changes of the moon influence the growth of beans, or, even that the earth is flat.

Of course, we may distinguish between the prejudices found among the jurors and the prejudices found among the upper class of city dwellers. The former undoubtedly do not have as much knowledge and have not enjoyed as much experience as the latter. Their notions are mostly more old-fashioned. Their minds are simpler. Their emotions are simpler. They are, in short, more primitive creatures. But, is not this in fact so far from

being a disadvantage an advantage in the jury system? Government after all, is a hard business. There are many people in the world and most of them are ordinary. They are not the flower of civilization, but they are the roots and stem. They may not understand Ibsen or the tendencies of contemporary drama; they may be entirely ignorant of Shavian art. But they have those settled, commonly accepted notions of life and experience which have been tried long enough in the hard school of the world's experience to have passed the test. Government and its most important function, the administration of justice, must be suited to this vast throng along with the more cultivated.

There are differing concepts of justice, and in most cases there is a better chance of justice from a jury of ordinary men than from any substitute. The ordinary "hill billy" is usually a man of open mind, considerable intelligence and emotion. A cultivated professional man tends to become selfish and is usually more cold hearted or at least case-hardened. It is by no means assured that a better justice would be administered by the latter type than by the former. A man who has no axe to grind, but is an honest, natural, emotional creature is about the most practicable, and it is submitted, the most just tribunal to which controversies can be referred. There is at hand an apt illustration of this truth. All can remember the time when juries were regularly inveighed against by many lawyers and laymen for prejudices in personal injury cases. If a brakeman working upon a railroad or a workman in a mill was injured, the jury was sure to find a verdict for the plaintiff, no matter how overwhelming the evidence of his contributory negligence might be. This litigation has largely ceased by reason of the Workmen's Compensation Acts which have adopted the view of the jury; that is, that the industry and not the workman should bear the workman's injury. And the law has thus, within

a few years readjusted itself so as to square with the juror's conception of justice, and we believe, with the common consent and approval of all thinking men. It is an apt illustration that justice does not always lie in the unbending application of the legal formula in which weak and erring men have endeavored to express it. A little more flexibility in its application through utilizing the assistance of a distinctly untechnical tribunal proves advantageous.

REVOLT OF THE JURY[5]

I am quite convinced in my own mind that the present attitude of juries is the result of the spread of general education and the development of a better understanding of the crime problem, and that however detrimental all this may be to the present machinery of justice it will in the long run make for progress in the age long fight against crime. The present attitude of juries is but a revolt of common sense, it is a protest against abstract justice of the blind-fold goddess type which the common people have come to believe is far apart from divine justice, bearing little resemblance to that which they strive to copy.

What now is the part which juries are supposed to play? To understand their part, one has to know what the other participants are expected to do, and he ought in addition to know the purpose or end they are all jointly aiming to accomplish. For example, to understand the play of a baseball player or of a football player, it is necessary to know what the team as a whole is striving to accomplish and what each individual is supposed to do in order to assist in bringing about this end.

To begin with, the purpose or end of the administra-

[5] By Louis N. Robinson, professor of sociology, Swarthmore College. *American Institute of Criminal Law and Criminology. Journal.* 18: 100-4. May, 1927.

tion of criminal justice is to protect society from acts detrimental to its continued existence and growth. There are many players and the rules are innumerable and extremely complicated. For our purpose, however, we will mention only the chief players and indicate very briefly what they individually do. Legislatures decide from time to time what acts are detrimental to society. Not only that, but in their great wisdom they also decide what is to be done with those who commit these acts. The police are supposed to catch those who have committed these acts. Now the police may not catch anyone or they may catch the wrong man and to make sure that the man brought in is the man who actually did the deed is the work of the court. The determination by the court of the guilt or innocence of the accused is often a difficult thing to do and constitutes a game to play within the larger game. It is necessary to mention a fourth set of players, prison officials for the most part, who take the convicted man and do with him what the afore-mentioned legislature said should be done with the doer of this act.

To sum it all up the aim or the purpose is to protect society. Theoretically, this is accomplished, first by the legislature specifying acts that are detrimental to society and by determining what shall be done to those who commit these acts, secondly, when the police catch these individuals that do these acts, thirdly, when the court identifies these people and fourthly, when the officials, charged with carrying out punishments determined by the legislature have performed their duty.

There are, we must admit, many other groups of great assistance in this struggle to protect society from crimes. The school and the church are two great agencies that help. All the social forces that are working for better housing facilities, more and cleaner forms of relaxation and amusement, for better physical and men-

tal health, will, we are convinced, do much toward lessening the number of crimes that are now committed. We will not, however, include any discussion of these, merely noting that the machinery of criminal justice after all is only one among several agencies that are working toward this end.

Few of our jurists have considered what may be called the time element in the administration of criminal justice. It is not at all unusual to find that a legislature meeting in session one hundred years ago determined not only that such and such an act was detrimental to society but determined also what was to be done with an individual not yet born and about whom nothing could be known who would commit that act in the year 1926. On the face of it, this seems to me to be not only an impossible thing to do, but a very foolish, nay even a wicked thing to do and the only excuse or reason why it ever has been done is because the whole attention in the legislature was focused on the act or crime and not on the man or woman who might commit such a crime.

Now before we go any further with this idea of the time element and its importance in this scheme for the protection of society, let us turn for a moment to what goes on within the court, to an examination of this smaller game within the larger game. The police bring in their man, he is charged formally by the state with having committed the act in question. The trial proceeds with the judge as presiding officer and with the attorney for the defense doing his best to prove that the man did not commit the crime. The jury's part is to listen to the evidence on both sides and to determine whether the man actually did or did not commit the crime in question. That is all they are supposed to do, and this is what they are now more or less refusing to do. Either they will not bring in the man guilty when the evidence plainly shows that he is or as Judge

Nott has said they try to render a judgment of Solomon in the case. We are now prepared I think to understand their point of view. Consciously or unconsciously they are opposed to the part which they are supposed to play in this game, the purpose of which is the protection of society. As in any other game, the success of the team depends on each player doing his part, but it is very difficult to get a player to do his part, to be as it were on his toes, when he no longer believes that the end can be accomplished even when he does play well the part that is assigned to him.

Let us illustrate this situation by an example. One hundred years ago a certain legislature decided that an individual who took property in a certain way was doing something detrimental to society. The legislature decided that anyone who committed this act would be sent to the penitentiary for ten years. Now in the year 1926, a man is brought to court by the police, charged with having taken property in this obnoxious way. The jury are asked to determine on the basis of the evidence offered whether this man actually did commit this act. If the evidence is sufficient and they do what they are supposed to do, this man will be committed to the penitentiary for ten years. This is indeed the "dead hand" with a vengeance. How could a legislature one hundred years ago say what ought to be done with this man then unknown, yes even unborn. Did they know, under what kind of social and economic conditions he would be born and brought up, what his heredity would be, did they know also what ten years in idleness in an over-crowded penitentiary would do to this man? No, they knew nothing of these things. They were bent on determining the injury suffered by society from this act and in placing on the other side of the scale an injury to the perpetrator equivalent to the wrong suffered by society.

Now whatever our statute books may say on the subject, we as a people no longer believe in this sort of justice. The present attitude of juries is not due to the relaxing of discipline nor is it to be traced to the influence of sentimental and moon-struck maidens who waste their tears on criminals. There has taken place in our minds a complete revolution on this subject of crime and criminals. We no longer care for abstractions and, whatever anyone may say, our criminal law is fundamentally an abstract thing, the product of the formal logicians of the eighteenth century, who believing that all men were created equal could build a system of criminal justice wherein mere man did not figure at all. If all criminals were equal, then of course the determining thing was the crime. The result of this abstract way of thinking was the development of a system of criminal justice that revolved around the crime not around the criminal, around the act not around the actor. We have, thank God, changed all this in dealing with juvenile offenders. The purpose of the juvenile court is not to hand to the guilty individual a punishment that some past and forgotten legislature determined for the then unborn child; its purpose is first and foremost to turn this child from evil ways. The whole emphasis is on the child, not on his crime. This is a sign of the revolution that has occurred in our way of thinking about criminal justice. We are at last interested in the criminal. Never again will we be able to compel juries to shut their eyes to the criminal while focusing their mind on his act. This I repeat is a great gain and will ultimately be acknowledged by jurists to be so. At the present time it is, of course, disconcerting to those who insist on going on playing the old game. The thing to do, however, is to remodel the game or, if anyone objects to my calling it a game, to install new machinery for the administration of criminal justice.

DISCUSSION OPPOSED TO JURY

ABOLITION OF JURY TRIAL IN CIVIL CASES[1]

Human institutions, of necessity are infallible; and man is prone to criticize and to suggest substitutions or alterations. Yet it is only through criticism and change that the flaws in existing things are pointed out and progress is accomplished.

However, because of this ease of criticism, one who takes upon himself such a role is often received with suspicion. Certainly one who assumes to find fault with a feature of our first courts which has been termed the "bulwark of our liberties," the "protection of the citizens' rights," and which has been eulogized by orators and writers as one of the outstanding institutions of the American people is bound to encounter much astonishment and opposition. Yet, it is my purpose to point out wherein the jury system in civil cases has totally failed and to advocate its abolition.

An English judge, when asked by a visiting American jurist why they did not do away with the clumsy English system of barristers and solicitors, quite indignantly answered: "Why, we have always had it." This represents the attitude of most Americans to the trial jury, and the fact that we have always had it is the only justification for retaining the system, if justification it is.

The jury system should be abolished in civil cases. (1) It has outlived its purpose as a political protection: (2) it has proved to be grossly inefficient; (3) the judge should be substituted for it as a trier of facts.

[1] From article by Rupert Bullivant in Oregon Law Review. *American Law Review.* 60: 938-52. November, 1926.

These are the three points that will be brought out in the course of the argument.

Just as in earlier times the ordeal and the trial by battle were discarded as a means of trial because they had outgrown their usefulness, because the divine power did not infallibly or even frequently interfere on the side of the just, so also must the jury be discarded as an unjust means of trial.

At first, in England, juries were composed of twelve men selected from the neighborhood of the defendant, who personally knew him, and who swore as to his good character. Later the jury took on its modern aspect as a trier of fact. In the Magna Charta, the right of trial by jury was guaranteed. In reality it was guaranteed to only the barons, the common people gaining no right whatever to it. Later, however, the use of a trial jury was extended to the common pleas courts. The right was confirmed by Henry III and redeclared in the Petition of Right under Charles I.

The function of the jury, as shown by history, was two-fold: (1) As a trier of facts; (2) as a protection against interference by the tyrannical power of the sovereign and by a corrupt and unjust judiciary.

Today, the jury has outlived its usefulness as a political safeguard. There is no tyrannical sovereign to interfere. The officers are all elected by the people and thus indirectly responsible to them. There is nothing to fear from the judiciary. The majority of judges are directly elected by the people or appointed by their elected representatives. Moreover, their character is such that no danger exists. The fearlessness, honesty, probity of the American judiciary is well known by all persons. Instances of corruption and scandal are exceedingly rare. Why, then, should we keep the jury, since it is not necessary as a political protection, and since, as will be shown later, it is not an efficient trier of facts, and in

fact is directly responsible for many of the defects and resulting criticisms of our judicial system?

Before proceeding further, let me make clear my position. Even the advocates of the system admit that it has defects, but they claim that, fundamentally, the jury is good, and hence it should be remedied, not abolished. However, even though many are agreed that it should be retained, they are not at all agreed as to its good features and bad features.

Some claim that the requirement of unanimity in the verdict is the most objectionable feature; others say it is the most admirable feature. Some say the judge should aid the jury and give his opinion as to the evidence, as is done in the federal and English courts; others claim that a jury is safe only when the judge can make no comments whatever on the evidence. Some assert that the chief advantage is bringing persons into closer contact with courts; others are of the opinion that bringing inexperienced men into the court to decide facts is the chief cause of dissatisfaction. Such differences of opinion as to the jury system might be multiplied to quite an extent.

This great diversity of opinion as to the ills and defects of the jury system is in itself a good argument against its retention. It merely shows how hopeless it is to attempt to retain an institution that has outlived its usefulness, that is wholly inadequate to meet the needs of present day litigation. If it is kept, it must be continually patched and remedied, and in what respect, no one is at all certain.

Hence my position is: Do away entirely with the jury and substitute some more suitable means of ascertaining the facts in its stead.

To continue, then, to the second issue of the argument—that the jury is grossly inefficient as a trier of facts, the reasons being (1) that jurors are not qualified by mentality or experience to try facts; (2) that

the jury is responsible for a great portion of the delays, technicalities and expense in our judicial system.

The qualifications of a juror are such that his intelligence is actually that of the lower classes of the community, so as to make him incompetent to decide the complicated matters usually presented to a jury. In Oregon, by section 990 of the code, the requirements are that he be (1) a citizen of the United States; (2) a male inhabitant of the county in which he is returned, who has been an inhabitant for the year preceding; (3) over 21 years of age; (4) in the possession of his natural faculties and of sound mind. This is typical of what is necessary in most states. No educational requirement whatsoever exists, nor any requirements as to general knowledge of the type of facts involved in the cases to be tried.

Moreover, because of the many exemptions from jury duty existing in the states, the members of the community belonging to those classes which we usually think of as being on a higher intellectual plane, are excused from jury duty. They are not excluded from duty, but, needless to say, there are few persons who are willing to serve in this capacity unless compelled to do so. Persons so exempted do not serve. As an example, let us take the Oregon Code, section 991: "A person is exempt from liability to act as a juror if he be: (1) a judicial officer; (2) any other civil officer of this state, or the United States, whose duties are at the time inconsistent with attendance as a juror; (3) an attorney; (4) a minister of the gospel or a priest of any denomination; (5) a teacher in a college, academy or school; (6) a practicing physician, a practicing dentist; (7) an acting noncommissioned officer or private of military organization of the United States or of the state; (8) acting member of a company of firemen; (9) acting ferryman; (10) member of legislature during session." Also

members of the national guard and telegraph employees are exempted.

In New York, in addition to the above, druggists, veterinaries, embalmers, railroad employees, pilots, steam engineers, come under the exemption. It is obvious that the above comprise a large portion of the respected or responsible citizens. All of them are very likely to have the attributes of a good juror, yet their services are not required.

The class of men competent for this important duty is still further cut down in many states by the power to excuse from jury duty: under this, men whose positions are so important that they will suffer loss by coming to court, do not serve. Thus many of the cool-headed, responsible business men escape entirely.

It is, however, a well known fact that a good portion of the juries in our trial courts are made up of loiterers and hangers-on about the court house, individuals who desire nothing more or less than the pay which they will get, who are prompted in no way whatsoever by motives of justice. This class is made possible by the unwillingness of the more responsible citizens to serve, an unwillingness which is caused by the delays incidental to jury service (which will be discussed later). Thus, there is this class of laborers, men with no purpose in life, sitting in the court room, as triers of fact, as members of the jury of his peers which every litigant is entitled to.

The residue available, then, for duty are to a large degree men of no responsibility and whose occupations do not develop the mental acumen necessary for a juror.

This low standard, then, points to the fact that a jury cannot intelligently render justice. This is indicated by still another fact, namely, that juries, instead of being ruled by reason, are influenced by emotion and prejudice.

The juror is only human, and his instincts and feelings are bound to have an important part in the result reached, especially so because he has not learned by court experience to discount the appeals of lawyers and testimony of witnesses which are levelled directly at this side of his nature. From this fact the present system affords great opportunities for the perversion of justice, for the litigant with a poor case to win out. Here is the loophole through which slip many of the unjust decisions. It has been said: Short on facts, long on sympathy, prejudice, passion, instinctive opinion.

The following are instances of prejudice on the part of the jury which are continually cropping out. (1) It is well known that in negligence cases, a corporation has less chance to win than an individual. Regardless of how excellent may be the defense, such as construction, management, or equipment, the corporation is found to be at fault. (2) In eminent domain cases the jury will sell worthless land to a railroad corporation at an exorbitant price. (3) Always an employer has less chance with a jury than an employee. (4) A religious opponent of a juryman, less than a co-religionist. (5) A member of a different race must always be handicapped by prejudice.

Frequently we find the psychological condition of the community, its attitude toward different matters, manifesting itself in the result. Supporters of the jury system contend that it is safer to entrust twelve men with the decision than one, or possibly two or three, judges for the reason that diversity of opinion is secured, and that there is less danger of corruption. While discussing the mental attitude of jurors and their psychological tendencies, it is well to refute this argument. Actually a decision of the twelve men is the decision of one, possibly two or three of them. Psychology shows us that it is one of the fundamental instincts of man to be led and do as others show him; the result is that one or two

dominating personalities, whether unanimity of verdict is required or not, will dictate the decision. Where, then, is this diversity of opinion which advocates claim for the jury? It actually does not exist.

To summarize, then, the characteristics and abilities of today's juryman, we find him to be low in intellectual qualifications; very susceptible to appeals to emotion and prejudice, rather than reason; prone to be led by one or two dominating personalities. Let us see what functions it is the juryman usually performs, with these obviously defective instruments.

The juror must decide the disputed facts according to the law and the evidence. After listening to the testimony, he must, from the maze of details given him, ascertain the truth. Testimony must be weighted, sifted, conflicts resolved, and the trustworthy material picked out from that which is not. Oftentimes the questions submitted are of a highly technical nature, such as commercial transactions, necessitating consideration, mathematical calculations, and long and intricate accounts. Surely a man of no experience with such matters, with the conduct and attitude of witnesses, and who, as indicated above, is likely to be of low intelligence and easily biased, is not qualified to render a just result.

After deciding the facts, the juryman must now apply the law, as given by the court, to the facts. Often instructions are long and complicated affairs, far beyond the comprehension of the ordinary layman. Yet the juryman is supposed to understand and apply them to the facts.

In Seville vs. Glosmer (79 Mo., 457) C. Phillips said:

> It is not safe in a series of instructions to trust largely to the continuity of reasoning, and the logical analysis of the panel of twelve; they are liable to be misled by the assertion of apparently distinct propositions in separate instructions, which to the professional mind be cognate and harmonious.

The juryman must listen attentively, remember testimony, weigh evidence, understand instructions on the law, apply law to facts. In any other vocation in the world today, this would require training and high intelligence, yet no such prerequisite exists.

Under the issue of inefficiency of the jury, the second main objection is that it is responsible for a great portion of the delays in our judical system. Today, especially, in our newspapers, magazines, and in public conversation, we find a growing dissatisfaction with the delay and technicalities of the courts. Certainly an instrument which causes this objectionable feature should not be retained.

In the first place, abolition of the jury would do away with the time, strain and scandal in impanelling jurors. Oftentimes hours and days are required to do this, the reason being that lawyers spend every effort by use of the peremptory challenge and challenge for cause to secure a jury which they can handle, not one which is impartial.

Again, in an attempt to keep the juror from being biased, there has been built up a vast and complicated system of procedure before a jury, and the law of evidence. This latter, especially, is one of the most involved phases of law which we have. This body of rules has in reality been necessitated by the great fear that the jury is incompetent to decide from all the facts, that its limitations are such that the evidence must be sifted and strained, that its bias and lack of intelligence will crop out unless it is governed by rules.

It is from violation of them and mistakes made by juries that so many appeals, reversals, new trials take place. If the verdict is against the weight of evidence, it must be set aside and a new trial had; if the judge makes error in admitting evidence, or counsel acts improperly to the jury, there is an appeal. Moreover, it is often that juries disagree and a new one must be se-

lected, this even occurring in some cases three or four times. Many other matters of this type afford grounds for new trials, such as improper instruction or disqualification of a juror for bias or some other matters. Also the many objections to testimony slow up the trial. Thus our dockets are crowded by appeals, new trials and reversals, caused in great degree by the presence of rules which seek to protect the jury from perverting the ends of justice, and by the mistakes of an inefficient jury.

This delay has resulted in the prevention of much just litigation. Because of it, witnesses die, the facts become stale, the positions of the parties change. This fact is frequently used by the party with a poor case to win out. In fact, so great are the expenses and losses of time that many corporations and individuals prefer to charge their claims off to profit and loss rather than subject them to the lengthy and hazardous process of litigation, caused largely by the system of jury trial. Circumstances of this kind are frequently used by large concerns to drive small competitors out of the field.

These constitute the main objections to the jury. They are defects which are fundamentally inherent in the system, which, in the main, can be wiped out by no amount of remedial legislation. The jury is fundamentally at fault and it must be cast out.

The defect of the low intellectual standard will always remain. The very nature of the jury, its democratic character is that all classes of the community must serve. The exemptions cannot be cut down for the reason that those exempted are mostly in occupations which require their daily presence. Also, intellectual qualifications would be very difficult to make because of the difficulty of drawing a definite line and because they would cause much resentment.

Clearly, the proneness of jurors to be led by emotions, prejudice, bias, can't be legislated out. They are human

traits which will always exist and will infallibly enter into the result.

The law of evidence, so responsible for delays, can't be done away with because, by the nature of the jury and its weaknesses, rules are necessary to attempt to make it reach a just result and to be free of wrong influences.

Clearly such glaring evils in an institution do not justify its retention, the more clearly so where they can't be remedied.

Thus far it has been shown: (1) That the jury has outlived the purposes for which it was intended; (2) that it is grossly inefficient as a trier of facts. The last issue to be taken up is that the judge is more efficient than the jury as a trier of fact, and is the most logical substitute for it.

First, let us see what actual precedent we have in this matter. Our present legal system admits the incompetency of the jury and the efficiency of the judge.

By the practice in the English courts and the Federal courts in the United States the judge in summing up gives his advice to the jury as to the weight of the evidence, and how to determine the relevant and irrelevant, and how to reach a verdict. Surely this is an anomaly—the judge may not draw any conclusions, yet he shall guide the jury and show them all the pitfalls in reaching those conclusions. This is an admission of an inability by jurors to reason as to the facts, an admission of the superiority of the judge.

By a system of rules of procedure and evidence, already referred to, we sift carefully all the testimony which shall reach the jury, chiefly because they are necessitated by our fear that the result reached will not be just, that the jurors are not competent to hear all the evidence, but only a certain part of it. Their very existence indicates a weakness in the system.

The judge in the capacity of trier of facts is no new

thing in this country. In England and in the United States, the judges of the equity courts have been entrusted with the decision of facts of as complicated a nature as in the law courts. In this field a jury is used but rarely. The rule in most jurisdictions being that the judge may use one to aid him if he so desires. This is rarely if ever done. Moreover, we do not frequently hear of unjust decisions in equity or any outcry against the system. In fact, the equity court has a reputation of being far more desirable for the litigant with a just case than a court of law. The situation is such that this branch is slowly increasing its jurisdiction because of the efforts of lawyers with a good cause to come into equity and submit both the law and the facts to the judge, thus avoiding the uncertainties of jury trial.

The equitable branch of the law includes facts just as highly involved as are found on the legal side, and of just as wide a range. Equity includes (1) all matters relating to trusts, including a consideration of fidelity, fraud, due diligence, and often damage; (2) the extensive field of matters relating to fraud, accident and mistake; (3) questions of identity, legitimacy, insanity, undue influence; (4) all facts connected with specific performance of contracts; (5) awarding damages in injury cases and incidental damages where equitable jurisdiction has already been involved. It would be useless to name the many other questions involved.

Furthermore, many states make it optional on the parties in civil cases to use a jury. Actually, the jury is frequently dispensed with, because, as in equity, the litigants prefer some other method which is more liable to reach a just result. The use of a jury is further cut down by its exclusion in courts of admiralty, bankruptcy and probate.

In England, under the Judicature Acts, whereby law and equity are concurrently administered, in 1911, out

of £5,150,267 worth of judgments rendered in the superior courts, only £218,980 worth, or fewer than 5 per cent, were in cases tried before juries.

Thus, the countries in which the jury system has the strongest foothold recognize its weakness and the desirability of the judge in its place. Especially in the United States is the anomaly painfully apparent. Where both law and equity are administered by the same court, in one branch the same judge is considered incompetent to decide a fact no more complicated than he is empowered to decide in the other branch.

A survey of the judicial systems of the entire world shows that the jury is the exception, not the usual thing in civil cases. In all of the countries of the continent, it is not found except in criminal cases. Here, again, the facts to be decided are of the same nature as in the Anglo-Saxon countries, yet we find in each court, one judge, or a group of two or three judges, deciding both law and fact.

In addition to this most convincing proof of the advantages of the judge in this role, let us examine briefly his advantages over the jury.

First, as has already been pointed out, because of the complicated nature of the facts and the functions to be performed, experience, logical thinking, and knowledge of the law are required. Certainly the judge who has observed all manner of witnesses, who knows their peculiarities, the weight of evidence and its application to law, is better suited than the illogical and inefficient jury. *Secondly,* in addition the great dignity attached to the bench and the responsibility of its members to maintain this reputation will secure more desirable results. The judge feels himself under an obligation to those who elected him or appointed him to do justice. He has a name to maintain, and responsibility on his shoulders. Contrast with this the jury which is

highly temporary in nature, which owes responsibility to no man. It appears in court one day and is gone the next, its members vanishing again into everyday life. Combine with this irresponsibility its lack of experience and knowledge, its susceptibility to emotional appeal and prejudice; the inference of the desirability of the judge is obvious.

Third, the standard of the legal profession will be raised by the proposed change. Opportunities for emotional appeal, oratory and harangue, based not on a just case but one short on facts, will be done away with. The judge, by his experience, is not open to such appeals and will require a clear and logical statement of facts without any of these befogging and misleading elements.

Fourth, as already indicated, the many delays, appeals, new trials, reversals, which are cluttering up our legal system, would be done away with. On the continent, W. H. Blymer, of the New York bar, states that a case occupies but one-fourth of the time of the American jury trial. Whereas in this country, for example, in Louisiana it takes one and one-half years to go from lowest to highest court with a case, and four years in New York; with the extinction of the delay obviously there will be a reduction of the expenses of court procedure.

No great upheaval in our legal system is necessary to introduce the judge as a substitute for the jury. Briefly, this would be accomplished by having the proposed court consist of three judges, the number of such courts depending on the necessity of the state. These judges would sit together wherever a jury is granted today by law; wherever it is not used at present, or the litigants prefer but one judge, one of those shall sit in trial of the case.

A system analogous to this is used by the United States Supreme Court, which is composed exclusively of judges, both in its original and appellate jurisdiction

This tribunal, needless to say, is the ideal of the country. It is also used on the continent.

Since, then, the judge has proved his worth in equity, and since the proposed change has in reality been tried out in our Supreme Court and in the courts of the continent, we would not be putting into effect a system which is highly experimental and uncertain, but one which has been proven and not found wanting.

Let us examine some of the arguments in favor of the jury and their actual worth. First, there is the argument advanced by Judge Deady in the American Law Review that by deciding difficult questions of fact, it protects the court from the rancor and distrust of the losers. The answer is that the present system of jury trial is the cause of this rancor and distrust. After long and tedious weeks or months in court, the verdict is simply "judgment for plaintiff" or "judgment for defendant," with no reasons whatsoever given for the result. Why not iron out this dissatisfaction by requiring the judge who decides the facts to write reasons for his decisions? This system is followed exclusively in France. It is just that the disappointed litigant know the reasons for his failure; yet it is clear that he fails to get them under the jury system.

Another contention is that the jury reaches a more just result by reason of the consultation and diversity of opinion secured. As has already been pointed out in discussing the mentality of jurors, prejudice and emotion, instead of reasoning, frequently dictate the decision. Also, this consultation by the jury is counterbalanced by the training and knowledge of the judge, and by the permanent and dignified nature of his position, to which he feels a responsibility. The jury is under no such restraint in that it consists of twelve men who vanish as soon as the case is tried, and who, combined with this irresponsibility, are susceptible to emo-

tional appeal and without qualifications of intelligence or experience.

Many adhere to the view that judges are prone to be bound down with a maze of legal distinctions and technicalities, and hence are too removed from the facts of every day life to decide them; that the jury supplies this connecting link with the world of reality. On actual facts this contention is not very valuable. As a rule, a judge is taken from active practice where he acquires a larger experience with everyday facts than the ordinary layman. His business as a lawyer was to investigate facts and be conversant with all different types of them. Moreover, we do not find the result contended for being reached in courts of equity, bankruptcy or probate. Their decisions, if anything, are regarded as more just because procedure and investigation is not tied down by the mass of rules necessitated by the presence of the jury. Also, unfamiliar questions of fact should be made clear by the use of expert testimony.

It is contended that the judge is more easily influenced than the jury of twelve; that this is made more easy by the elective nature of most of the state judiciary, whose independence would be threatened by influential litigants. Again the answer is, that no such thing has occurred in equity, where the same judges are triers of fact. It is strange how the advocates of the present system can so blindly and consistently overlook the concrete instance of the fallacy of their arguments existing today in our legal system. Moreover, the body of our judiciary has a reputation for probity and honesty which is almost unimpeachable, so as to make them above corrupting influences.

The last point under this refutation is that the jury is not better suited to decide damage cases than a judge. Clearly it is not in the case of proximate damages, since they are decided by fixed rules of law and evidence; it should be still clearer that they are

not in the case of punitive damages for the reason that in the latter, there is too large an opportunity for the play of emotion and prejudice so characteristic of the jury.

Let me now summarize the case presented for the abolition of the jury in civil cases. First, it has outlived the purposes intended for it originally as a trier of fact and a protection against encroachment by judges and sovereigns, owing its existence today merely to the custom of always having had it. Second, it is grossly inefficient as a trier of facts in the following respects: (1) That because of the nature of jury duty and its requirements, men of poor intellectual character are secured; (2) that they are ruled by emotion and prejudice rather than reason; (3) that the complicated nature of the juror's duty renders them incapable because of their lack of training and intelligence; (4) that it is responsible for the delays of our court system; (5) that these defects are such that they cannot be remedied if the jury is retained, because they are inherent in the system itself.

In the third issue, the judge was shown to be superior to the jury as a trier of facts: (1) Because the rules of evidence admit the juries' weakness; (2) because the exclusive use of the judge as a trier of fact in equity, bankruptcy, and probate matters, as well as in the courts of Europe, demonstrate his abilities; (3) because the judge by reason of his training and experience and permanent position is more responsible than the jury.

Why not discard this system remaining in our courts by custom rather than by reason? On every hand we find demands and appeals to remedy the many injustices of law today. It is lamentable that law, of all pursuits, is the slowest to follow the path of progress. Let us heed the voice for reform and cast out this drag on the efficiency of our courts in civil cases—the jury.

TRIAL BY JURY[2]

The jury is far from the divinely created and sanctioned bulwark of human liberty which right-thinking men now suppose it to be. It took its origin in a non-judicial field and was clumsily adapted to its present purpose simply because nothing better was at hand. Far from being a rampart of human freedom or a safeguard of democracy, it was in its origins one of the most potent and highly prized instruments of royal absolutism and monarchical oppression. Compared to other institutions of the time, trial by jury probably made a fairly respectable showing in the Sixteenth Century, when there were relatively few highly trained lawyers, and the men summoned for jury service represented the intelligent and cultured upper class. But the progress of medical knowledge, sociology and jurisprudence since that time has made it as preposterous and out of date as the sun dial of James I or the coach of Charles II. Moreover, the average jury is today chosen from an altogether less intelligent class than that which furnished jurymen in the Sixteenth Century.

The complete futility and inadequacy of the trial by jury can be best indicated by a brief analysis of the actual procedure from the impanelling of the jury to the rendering of the verdict. The selection of the panel is determined by lot, the names of a definite number of citizens being drawn at random from a collection of slips or cards bearing the names of all the qualified citizens of the county. At best, any such panel can only at rare intervals include a better than average group of citizens. It cannot be limited to those possessing unusual intelligence or special knowledge of criminal matters. In the usual case, the panel is made up of an average collec-

[2] From article by Harry Elmer Barnes, formerly investigator for the New Jersey Prison Inquiry Commission and the Pennsylvania Commission to Investigate Prison Systems. *American Mercury*. 3: 403-10. December, 1924.

tion of farmers, shoemakers, barbers, plumbers, hod-carriers, and day laborers, with a few professional or business men sprinkled among them. In many cases, of course, the theory of a choice by lot has become a legal fiction, and accommodating commissioners of juries are willing, for a reasonable consideration, to draw the names of the men desired by district attorneys or lawyers for the defense. Such selected panels are by no means rare, and when one of them supplies a jury the outcome of the trial is assured before a single witness has been summoned. Even when a panel is honestly selected it fulfills exactly the democratic doctrine that special training is in no way essential to competence in the handling of public affairs. It is drawn from precisely the classes from which a mob might be raised by the Klu Klux Klan.

In the choice of the actual jury from the panel we observe the operation of a process that may be called counter-selection. The obviously more intelligent and abler members, drawn from the business and professional classes, are for the most part automatically excused from service, leaving only the farmers, cobblers, barbers, clerks, hod-carriers and day-laborers. These men are questioned forthwith as to whether they have read about or formed any opinion concerning the case. Those who answer in the affirmative are likewise automatically disqualified. It is quite apparent that in regard to any significant case any honest man possessing a modicum of literacy is compelled to give an affirmative answer to this interrogation. Hence, the actual choice of jurymen is limited to the illiterates and the liars.

Naturally, the attorneys on the two sides desire to obtain a jury which will be *a priori* as favorable as possible to their sides. Therefore, they challenge all jurymen who, because of their party affiliation, religious belief, class membership or nationality may possibly be against them. If the defendant is a prominent Democrat,

the district attorney will naturally desire a Republican jury, and a Catholic defendant suggests immediately the desirability of having a heavy representation of Methodists and Baptists. If a so-called Red is on trial the district attorney endeavors to get a jury of bank-clerks and stock-brokers, while the counsel for the defense labors to secure veniremen who admire W. Z. Foster. The liberal legal arrangement for challenging without cause and the practically unlimited right of challenging *for* cause, make this manoeuvering easy. Only an exactly equal balancing of knowledge and wits on the part of the approving barristers can prevent it. The jury chosen is thus often either "fixed," "hand-picked" or composed of the most colorless and feeble-minded of the illiterates and liars.

This jury, after a few days of bewilderment in the new and strange atmosphere, settles down into a state of mental paralysis which makes it practically impossible for the majority of its members to concentrate intelligently and alertly upon testimony and the rulings of the court. At best, it is in a state of distraction and absent-mindedness. The farmer wonders whether his hens are being fed or his horses properly bedded down, and the drummer bemoans his lost sales. Awakened from time to time from this stupor and these fantasies by the unusual beauty, volubility, resonance or obscenity of the witnesses and testimony, the jurymen suddenly pounce upon some more or less irrelevant bit of testimony and forget or overlook the most significant facts divulged by the witnesses. Thus we have, in a typical jury trial, the testimony of the witnesses and the rulings of the judge presented to a group of colorless men drawn from the least intelligent elements in the population at a time when they have lapsed into a mental state which practically paralyzes the operation of their normally feeble intellects.

The situation as regards the testimony itself is

scarcely more satisfactory. Psychologists, following the pioneer work of Münsterberg, have proved time and again that the most honest and intelligent eye-witnesses, having observed an act in question leisurely and directly, are unable to testify about it with any degree of exactitude or unanimity. The testimony normally produced in a court-room is incomparably inferior to that brought forth in carefully controlled psychological tests. There is usually a paucity of eye-witnesses, and those that actually exist are rarely persons of intelligence. Quite as likely as not they are among the "undesirable citizens" of the place, who would not be believed under oath if they were disgorging from any other vantage point than the witness-chair. But even these inferior persons with their inadequate information are rarely allowed to testify in a straightforward fashion. The technical rules of evidence often prevent their being permitted to tell the most pertinent things they know. On the other hand, counsel may seduce them into making all sorts of vague insinuations about things of which they know practically nothing.

But even this is not the worst of it. As everyone who is not absolutely innocent of court procedure knows, witnesses are usually as carefully coached by counsel as prize speakers in a rhetorical contest. Very frequently the "best" type of witness is one who knows absolutely nothing about the case and so may be coached from the beginning to tell a coherent story. Convictions or confessions of perjury in all sorts of cases, from the celebrated Mooney case to the recent case of Sacco and Vanzetti have demonstrated the frequency of this building up of "impressive" testimony by counsel and witness without the slightest factual basis. It is one of the marvels and injustices of our criminal procedure that in the case of a conviction of perjury the witness alone, instead of the witness and counsel together, is compelled to suffer the penalty of the law. But even if we

had the most accurate testimony by witnesses of the highest intelligence and undisputed veracity, its value and significance would be practically lost upon the illiterate, inattentive and distracted jury. Hence, the outcome is essentially this: a body of individuals of average or less than average ability who could not tell the truth if they wanted to, who usually have little of the truth to tell, who are not allowed to tell even all of that, and who are frequently instructed to fabricate voluminously and unblushingly, present this largely worthless, wholly worthless, or worse than worthless information to twelve men who are for the most part unconscious of what is being divulged to them, and would be incapable of an intelligent interpretation of the information if they heard it.

In case there is intelligent, pertinent and damaging testimony and a few competent and alert jurymen have slipped by the lawyers during the period of challenging the jury, an attempt is made by the lawyer whose side seems likely to lose by this testimony to obscure its significance and divert the attention of the jurymen from it. Every form of inflammatory oratorical appeal is permitted by the rules and every type of effort to stir the prejudices of the jurymen. The jury may even be covertly threatened with mob reprisal if it does not render a certain type of verdict. Particularly in closing appeals is this rhetorical gaudiness utilized. If the evidence is strongly unfavorable to one party, the lawyer representing it is likely to ignore the testimony altogether and to appeal solely to the emotions of the jury. And it need not be said that to the average jury an emotional appeal is far more potent than a factual demonstration. Perhaps the most instructive thing about the modern jury trial is that neither the district attorney nor the counsel for the defense is vitally interested in the hard facts. The district attorney commonly desires to convict whether the defendant is innocent or

not, and the counsel for the defense desires an acquittal whether his client is guilty or not. Moreover, it is the jury which invites the lavish use of money in hiring expensive counsel to obscure facts and create fiction—that transition which Hobhouse describes as the substitution of battle by purse for the ancient battle by person. Before a group of trained experts the vaporings of high-priced counsel would have about as much standing as the pulpit gymnastics of Billy Sunday.

The technical rulings of law are as ineffective before the jury as is the testimony. The average juryman is abjectly ignorant of even the most elementary law, and almost invariably misses the significance of the judge's interpretations of it. Even in those cases where the rulings are simple, explicit and direct, the jury often brazenly and defiantly ignores them. A writer cites an interesting case where a judge instructed the jury to bring in a verdict in a certain manner unless they felt that they knew more about the law than he did. Astonished when they disregarded his advice, he reminded them of his charge. Whereupon the foreman responded; "Well, jedge, I reckon we considered that point, too." Especially futile are the rulings with respect to the rejection of evidence that has been actually presented. If a juryman has been impressed with testimony, in not one case out of ten will he be influenced by a subsequent ruling of the judge that it is irrelevant and must be excluded from consideration.

The burlesque upon science and justice which trial by jury thus presents is carried from the court-room to the room where the jury deliberates. Here it is free to, and frequently does, ignore absolutely all the instructions of the judge and all the testimony presented, and comes to its decision upon the basis of the prejudices of the members. In a recent notorious murder trial in New Jersey the jury frankly disregarded all the testimony, knelt in prayer, and then found a unan-

imous verdict for the defendant. This case was unique only in regard to the frankness of the jury's confession of the method it pursued and the publicity which that confession received in the press. Even in cases where a jury is reasonably alert in following the testimony, the desirable results of such an unusual phenomenon are likely to be destroyed by the presence upon the panel of a powerful and impressive personality or a stubborn moron. There are innumerable cases of a miscarriage of justice due to the conversion of the jury to the point of view of a prejudiced but convincing orator or to the presence of a juror who through bias, bribery or stupidity has held out against the judgment of his eleven colleagues. And even the most elementary psychology makes it clear that though we had twelve able men on the jury they could rarely come to a concise, definite and well-reasoned agreement upon the basis of a study of the same body of facts.

We have thus the spectacle of a "fixed" or "selected" jury, or one of colorless liars and illiterates deciding the matter of the corporeal existence, public reputation, property rights or personal freedom of a fellow-man upon the basis of prayer, lottery, rhetoric, acrimonious debate or intimidation, in ignorance or defiance of legal rulings which they do not understand and of testimony, perhaps dishonest, which they have only imperfectly followed, and from an intelligent comprehension of which they have been diverted by the fervid emotional appeals of counsel. If one were to protest against the accuracy of this picture by the counter-allegation that most verdicts are nevertheless sound and that such a result could scarcely be expected from so grotesque a procedure as I have described, the first answer suggested would be the query as to how one knows a particular verdict is a correct one. The majority of our convicted murderers go to the chair bawling protestations of innocence, while many obviously guilty ones are freed. There be-

ing under our system an opportunity only for a verdict of guilty or not guilty, by the mathematical laws of chance verdicts should be right in 50 per cent of all cases, taking a sufficiently large number of cases and extending them over an adequate period of time. Surely there is no person of reasonable sanity and literacy who would contend that more than half of our jury verdicts are accurate, or that the majority of those which are sound are such for any other reason than pure chance. An equally satisfactory result might be obtained far less expensively and in a more expeditious and dignified manner by resort to dice or the roulette wheel. I should be quite willing to defend the thesis that, in so far as certainty and accuracy are concerned, the modern jury trial is not a whit superior to the ordeal or trial by battle.

The amusing but tragic travesty which almost invariably accompanies a jury trial is due, chiefly, of course, to our democratic hallucination as to the intellectual acumen, information, and judgment of the average specimen of *Homo sapiens,* and to our entirely wrong-headed and antiquated concepts in regard to society's proper attitude toward the criminal. Hitherto, our criminal justice has been concerned almost entirely with the crime and its commission and not with the criminal and his personality. Modern criminal science repudiates this mode of approach. It is the criminal and not the crime which must be primarily considered, whether we emphasize the reformation of the criminal or the protection of society. The nature of the criminal personality is the point of attack for the rational criminologist, and there is no greater scientific fallacy extant today than that which was urged so tenaciously by Mr. Crowe and his associates in the recent Chicago trial, namely that the penalty should be made to fit the crime. Only in a very limited degree is the crime any real criterion of the potential danger of the criminal

to society or of the possibility of his reformation. The California Bluebeard, J. P. Watson, who was discovered some four years ago to have killed at least nine wives, was potentially less dangerous to society than a low-grade feeble-minded boy whose chief offense to date has been the pilfering of marbles and candy. Mr. Watson, under proper therapeutic treatment, could probably have been cured of his compulsion neurosis in a couple of years and restored as a safe member of society, but every criminally inclined imbecile is an incurable potential murderer as long as he lives, even though he may never commit any crime during his entire career.

Accepting, then, as basic the notion that we should deal with the personality of the criminal and not with his alleged act, it immediately becomes apparent that criminology is a highly complex technical subject. To be successfully pursued it requires the collaboration of biologists, psychologists, psychiatrists and social workers. Obviously, its problems are not to be entrusted to lawyers or to the sort of men who serve on juries. The jury-room is no more a place for the functioning of the common man than the operating-room of a hospital, the designing-room of the American Bridge Company or the research laboratory of the General Electric Company. Least of all can we rationally entrust the decision in a case of alleged insanity to the average man. Imagine, for example, a group of plumbers, barbers and the like being assembled before a class of medical students to diagnose a case of inflamation of the pancreas, or gallstones. Such a grotesque absurdity would be exactly comparable to the burlesque of calling a jury to decide upon the insanity of a defendant in a criminal case were it not that the determination of insanity is often a much more difficult and subtle task than the diagnosis of a physical disease. If Mr. Crowe desired to have himself laughed out of the society of rational men, he could have furnished no better ground than his plea

for a jury to determine the mental state of Loeb and Leopold.

Modern criminal science, indeed, makes it clear that a lawyer is a wholly improper person to have any dealings whatever with criminals. He is as much out of place in the criminal court-room as he would be in the hospital or the chemical laboratory. Of course, we shall probably need legal forms and prescriptions for the conduct of the new criminology, in the same way that we now have legal regulation of medical practice and hospital organization, but the lawyer is not today thought to have any proper function in the bacteriological institute, the psychiatric clinic or the observation ward of a hospital. We can, perhaps, tolerate the presence of a judge, but we can safely assume that all the legal guidance necessary may be supplied by this judge without the assistance of prosecuting attorneys or lawyers for the defense. The legal profession, of course, will not welcome any proposal, however scientific and logical, which will forthwith remove a considerable portion of its professional income. But this obstacle, in due time, will be worn down, as it has been in the past in connection with the progress of scientific knowledge in other fields. We have taken the practice of medicine from shamans and surgery from barbers, and in time we shall take criminology from the legal profession. No unprejudiced and informed person can deny the need for this reform, for it is probably true that the average contemporary barber is better equipped to perform a major surgical operation than the average lawyer is to deal scientifically and efficiently with criminals.

The new criminology will delegate the study and treatment of the criminal to a permanent group of experts under the leadership of trained and enlightened psychiatrists. Such a group will not be concerned primarily with the mere legal guilt of the person accused. Guilt of criminal action will be regarded only as a symp-

tom of initial significance. Accusation and guilt will be viewed chiefly as means of bringing a criminal personality into the custody of scientists. The important question will be the menace of the individual to society and the possibility of so treating him as to eliminate that menace. If it is found that his personality is such as to make it permanent and serious, he will be segregated for life,-whether he has committed a multiple murder or stolen a bag of peanuts. On the other hand, many a person who has committed a murder will be committed to .a sanitarium for treatment, with the expectancy of his ultimate release to a life of freedom if his motivating compulsive disorder is of the type which promises recovery under treatment.

Those who allege that the new criminology will not offer adequate social protection argue badly and in a circle. Surely no person would contend that our present criminal jurisprudence in the United States offers adequate protection against, say, crimes of violence. A careful statistical study by the Metropolitan Life Insurance Company has recently shown that there is only one execution to every one hundred and forty-six homicides in this country and that our homicide rate is seventeen times as high as that of England. The new criminology will prescribe a technic and procedure which will be much more effective than even the English procedure. For the first time in the history of criminal jurisprudence there will be a group of individuals actually interested in the real facts about crime and capable of making use of them in an intelligent manner. It will no longer be a matter of gubernatorial ambitions on the part of the district attorney or fees and reputation for the counsel for the defense. The new system will go beyond Chief Vollmer in urging improvements in our police, so as to make the discovery of crime and the subsequent retribution swift and sure. It will advocate devices to discover in advance of criminal action the existence of

personalities likely to become menaces to society. In the case of a young person suffering from incipient dementia-praecox we do not insist upon waiting until he has assassinated his grandmother before we commit him to an institution. Likewise, it is not invariably necessary to wait until a potential murderer has committed his crime before he is detected and segregated. Many will allege that it will be very difficult to discover such potential criminals in advance, but it may be retorted that it is equally difficult to discover persons who are spreading contagious diseases. Yet it is only as we succeed in this last that we are capable of giving any reality and value to preventive medicine. In all probability, arrest by ever more scientifically trained police will remain a major method of bringing the criminal to the attention of psychiatrists, but a greater and greater percentage of anticipations will be realized through mental hygiene clinics, compulsory mental testing, and the extension of psychiatry into the work of the public schools.

ABOLISH THE JURY[3]

Aside from all minor matters the great obstructing incubus upon the administration of American law, both civil and criminal, is the jury system. A careful and thoughtful consideration of the whole subject will disclose this much-worshipped, ever-praised and exalted jury system to be the arch obstructor of justice in all the American courts.

It is the jury system that entails the bulk of the costs to both states and litigants.

It is the jury system that necessitates so many costly changes of venue.

It is the jury system with its numerous hung juries that causes so many mistrials.

[3] From article by J. C. McWhorter, Buckhannon, West Virginia. *American Law Review.* 57: 42-56. January, 1923.

It is the jury system through which, in the giving of instructions and introduction of testimony, so many errors creep into trials, necessitating appeals and new trials, with their attendant expense and delays.

It is the jury system that causes so many interminable delays and accompanying useless expense in selecting satisfactory juries before trials actually begin. Sometimes weeks, and even months, are required for the *voir dire* examination of hundreds of talesmen before a jury can be secured; then often followed by utter failure, with its attendant change of venue on account of the agitation accompanying such search for a competent jury. Cases like the Ponci case, in Suffolk County, Massachusetts, which cost that state and county, according to press reports, over $4,400; the Thaw case of New York, with its sickening, morbid, and demoralizing publicity and scandalous use of money, both public and private; the Herrin cases of Illinois; the recent "treason cases" of West Virginia, costing that state scores of thousands of dollars, are only a few of such instances. They are of almost daily occurence in our courts.

It is the jury system that consumes time at the public expense in gallery playing and sensational and theatrical exhibitions before the jury, whereby the public interest and the dignity of the law are swallowed up in a morbid, partisan or emotional personal interest in the parties immediately concerned.

It is the jury system that makes possible the administration of mob law in the courts, either on behalf of the state, as in the Leo Frank case in Georgia, or on behalf of the defendant, as in the Nutt case in Pennsylvania.

It is the jury system that pads our trial dockets with unmeritorious cases that would never be in court but for the expectation and hope of unscrupulous litigants and their scarcely more scrupulous lawyers to win unjust

verdicts by emotional appeals to the passions and prejudices of juries, and that makes possible the subsistence in the legal profession of that class of shyster lawyers known in the cities as "ambulance chasers."

It is the jury system that inspires the criminal with contempt for the law and its slow and bungling processes, and buoys him with hopes of escape through the easy sympathy of our warm-hearted juries.

In short, one has only to sit in our courts and observe their work to see that nearly all the delays, obstructions, useless costs, failures of justice, and general weakness in our whole system of law administration are related intimately with the jury system.

This clinging to old institutions and formulas is natural, and is often a source of safety against wild, untried, bolshevik schemes that would override all established order. Nevertheless, as painful and fearsome as the operation may appear to be, the human race is compelled from time to time, in response to the irresistible forces of progress, to cast off old and impeding methods and institutions, and adopt new ones, better fitted to meet the requirements of an advanced order of things. The whole history of human civilization is a simple record of just such processes. The adoption of the jury system, centuries ago, was one of those advance steps in the development of Anglo-Saxon liberty which the social conditions of that age required. The rejection of that system at this time, under new and entirely changed political and social conditions, is another such step.

What have we really to fear from discarding the jury in both civil and criminal procedure and substituting two judges as the triers of facts, with the power in them to call in a third judge in important cases?

It is difficult to imagine a more illogical and unbusinesslike way of trying cases than by a jury of twelve men selected as they are. One of the profoundest lawyers of any state, a short time since, in discussing with

me this question, illustrated the folly of our jury system in this manner. He said: "If my watch is out of repair, I seek the services of a jeweler; if I am sick, I call a physician; if my automobile gets out of repair, I employ a mechanic; if I want a house built, I look for a carpenter; but if I have a complicated case to be tried, involving a careful, dispassionate weighing and balancing of testimony, requiring keen observation, analytical discrimination, logical deductions, and the thoughtful application of the principles of law to the facts, I am compelled to seek the aid of twelve men wholly inexperienced and unaccustomed to such delicate and exacting work, utterly unlearned in the law, herd them together like a bunch of cattle, have their passions and prejudices appealed to, then look to them for correct decisions. The whole thing is ludicrous, illogical, impractical, and thwarts justice.

This is a clean-cut statement of the whole case.

Dr. Meiklejohn, of Amherst, recently declared that "Democracy, as we have it, is a program for fallible mortals, and it must work fallibly." This is certainly true, and justice, at best, will always be fallibly administered even through the best of judges. But why add to this fallibility by the employment of twelve wholly inexperienced and untrained men, under all kinds of technical rules and restrictions, most often under conditions of bewildering confusion, to try to do in their bungling way the work which even the most skilful judges, experienced and especially trained, can do only imperfectly?

Of course this is all met, or supposed to be, by the statement that it is safer to trust twelve men, "good and truly tried," than two or three judges. Why so? Who does not know that in practically every jury case one or two of the strongest men really guide, control or influence the rest of the jury and in fact render the verdict? After all, the jury's verdict is most often the finding of one or two strong or thoughtful men con-

curred in by the other members of the jury because they have no well-defined opinion of their own. I do not say this in disparagement of the intelligence of the average jury. It is simply the way of all unskilled and untrained men in every walk of life.

In this age every department of business, to be successful, must be directed by especially trained men. Specialization is the product of our rushing, busy age. There is no escape from it, and should be none. This business principle is being applied in every department of human activity except in jury trials, and there we lag behind. A judge with his experience in office added to his experience as a lawyer becomes more or less expert in the art of weighing testimony and an adept in detecting perjury and dissimulation and craft. Crookedness cannot pass him undetected as readily as it can a non-expert jury. Criminal lawyers can't play upon his emotions and blind him to the cold facts as they can with juries. If the judges were required to hear and pass upon the testimony of witnesses without the intervention of juries, litigants and witnesses would soon understand that they are testifying before men whose learning, training and experience enable them to discern perjury and deception with almost unerring accuracy. Under such conditions the judges would soon learn and understandingly apply the psychological principles of what Hugo Münsterberg is pleased to call a "new special science dealing with the reliability of witnesses and their memories."

It is well known to all lawyers in actual practice that when a case based upon truth and simple justice is presented the wise lawyer searches diligently for some door to the equity court where he can get to the judge with both law and facts and escape the jury. On the other hand, it is equally well known that every shyster lawyer appearing for a shyster client, relying upon trickery, perjury, fraud, passion or prejudice to win his

case, assiduously seeks the jury and avoids the court. The man with a just cause trusts and seeks the court. The man with an unjust cause trusts and seeks the jury.

This is the deliberate verdict of mankind upon the respective merits of judges and juries as triers of fact based upon common experience. As a result equity jurisdiction is constantly expanding, not because the courts are greedily reaching out after jurisdiction, but because litigants with the righteous causes are beating at the doors. In these courts of equity, where the judges find the facts and apply the law, we find little complaint on account of delays, excessive expense or injustice. Of course judges will make mistakes, and here and there a crook or political shyster will get on the bench; but, notwithstanding this, the verdict of common experience in these days of democracy is that the judge is far safer, if your cause is based on merit, and that the jury is far safer if your cause is based on arrant rascality.

I believe in the integrity and ability of our American judges. The American courts in the persons of the judges on the bench, not the juries in the box, have been the bulwark of American liberty. Time and again, when passions were aroused, and feeling ran high, and sectionalism lifted its hideous mein in the executive and legislative departments, it was the judges, not the juries, that saved the people's rights. The liberties of the American people have always been safe in the hands of the American judiciary, and I perceive no reason to doubt that such safety will continue.

WEAKNESS OF JURY SYSTEM[4]

One of the most common causes for the breakdown of criminal justice is found in the workings of the jury system in the form in which it exists in America. This

[4] From article "Crime and Judicial Inefficiency," by James W. Garner, associate professor of political science, University of Illinois. *Annals of the American Academy.* 29: 609-11. May, 1907.

is due mainly to the practice by which the jury is exalted at the expense of the judge and a unanimous verdict required to convict. There is still a disposition, as in Blackstone's day, to worship the jury as a sort of fetish and to regard the judge with a kind of superstitious terror, although nearly everywhere the judges are popularly elected for definite terms. In some states this feeling is so deep rooted that juries are, by the constitution, made judges of the law as well as of the fact, and practically everywhere they are forbidden to even listen to suggestions from the court concerning questions of fact. As Judge Grosscup well says, the American judge is practically not allowed to take part in the trial of cases. His position is rather that of an umpire or moderator than of a judge in any real or vital sense. He may listen to applications of various kinds and make rulings or motions, but he cannot comment on the evidence, or review the facts, sifting out the material from the immaterial, and putting them before the jury in intelligible and coherent form. It matters not how much counsel may confuse and mislead the jury by their arguments, the judge cannot set them right before giving the case into their hands. Secretary Taft in a recent address complained of the position of impotency to which American judges have been reduced, and advocated the restoration to them of some of the powers which English judges enjoy at common law, especially if the unanimity rule as to verdicts is to be retained.

The weakest point in the jury system is the rule requiring unanimous verdicts to convict. Although time honored, there have always been some to see the absurdity of the rule. Hallam, in his *Middle Ages,* called it a "preposterous relic of barbarism"; Jeremy Bentham and Francis Lieber inveighed against it, and Judge Cooley, in his edition of *Blackstone,* declared that the rule was "repugnant to all experience of human conduct, passions and understandings," and asserted that "it could

hardly in any age have been introduced into practice by a deliberate act of legislature." Justices Miller and Brown, of the United States Supreme Court, and ex-Judge William H. Taft, are all on record as favoring a modification of the rule. Justice Ingraham, of the New York Supreme Court, has suggested the possibility of adopting a rule making a verdict by three-fourths of the jury sufficient to convict, subject to the approval of the presiding judge. Nowhere on the continent of Europe does the unanimity requirement prevail. In Germany, Austria and Portugal, a verdict may be returned by two-thirds of the jury; in France and Italy by a bare majority, and in the Netherlands, where crime is almost nonexistent, trial by jury does not prevail at all. In Scotland, curiously enough, a unanimous verdict is required to convict in civil cases while a two-thirds verdict suffices in criminal cases. In England the unanimity rule still prevails but juries are never empowered, except in libel cases, to pass on questions of law, and in determining questions of fact they are so much under the control of the court that many of the abuses which result from jury trials in the United States are avoided.. The theory upon which the unanimity rule rests is that twelve men may be found who will take the same view of a disputed fact, that the balance of each juror's mind can be struck in the same direction, that all are able to feel the same cogency of proof and that no one can be drawn to a conclusion different from that at which his fellows have arrived. It is needless to say that such conditions are rarely present in the minds of twelve men picked up at random from the community. The result is that in many cases the unanimity is apparent and not real. Everyone is familiar with cases in which a single juror has set at naught the opinions of eleven—has, by sheer obstinacy and power of physical endurance, compelled his associates to return verdicts which did not represent their real convictions, or driven them to disagreements, in

either case defeating justice. The unanimity rule gives too much power to one man. It virtually places the protection of the community in the hands of a single individual who is often selected without regard to mental or moral qualification.

It is well known that verdicts are often compromises. The hard lot of the juror who is kept away from his home and business often tends to drive him to yield a few points and ultimately to sacrifice his real conviction in order to escape from the discomforts and hardships incident to jury service in protracted cases. In many of the American states the unanimity requirement in the trial of civil cases has been dispensed with, and in a considerable number of states the jury may be waived altogether with the consent of the parties. Likewise in a number of states the constitution permits verdicts to be returned by less than twelve jurors in cases involving misdemeanors, and in several (Louisiana and Montana, for example) a verdict by two-thirds of the jury may suffice for conviction in all cases not amounting to felony. Everywhere there is evidence of increasing dissatisfaction with the results of the unanimity rule.

One of the principal weaknesses of the jury system is the rule which requires the jury to be satisfied beyond a reasonable doubt of the guilt of the accused before returning a verdict of conviction. As if this were not enough, we not infrequently find the courts delivering instructions to juries to give the "most charitable and merciful construction" to the facts. This rule, together with the sacrosanct interpretation given to the doctrine of presumed innocence, a presumption which, as Dean Huffcut well observed, is raised by some courts to the value of actual proof of innocence, enables a large proportion of criminals to escape punishment. Both rules are no doubt the means of occasionally saving an innocent man, but by weakening public confidence in the courts and encouraging crime they have caused the death

of many times the number of those whom they have judicially shielded. The rule as to reasonable doubt should be abolished and the jury required to convict when satisfied by a fair preponderance of the evidence of the guilt of the accused.

WHAT IS WRONG WITH THE JURY SYSTEM[5]

America, no doubt, is more given to criticising her institutions than any other country on the face of the globe. I presume every American thinks the freedom of speech which the Constitution guarantees is a duty thrust upon him to stir up things occasionally. Very few of us neglect this duty or deny ourselves this privilege. Everything comes in for it occasionally, but, when all else fails, the jury system is always a fruitful source for soulful reflection and destructive logic.

What is wrong with the jury system? Do you know? Has it ever ocurred to you that you might be in some measure to blame for the miscarriage of justice for which our courts are daily blamed?

How many men do you know who are willing and, possibly, anxious to serve on juries, whom you consider qualified to be there? How many of these men would you be willing to trust with the settlement of your business affairs or with the determination of your personal guilt or innocence?

I had a case which attracted a good deal of local interest, because of the parties concerned. Both were Jews and both inclined to air their troubles to any one who would listen to them.

For three days we submitted evidence of the contract between the merchant and his manager. There was a certain fixed salary and a graduated scale of com-

[5] By Arthur Harris McConnell, Coeur d'Alene, Idaho. *Canadian Bar Review.* 3: 199-202. March, 1924

missions on sales. Because of careful training and coaching and a few threats, my client was fairly submissive. The other party to the suit, confidant of his own ability and wishing to impress the jury, put on a show that would have gone on a vaudeville circuit.

The verdict of the jury had no relation to the contracts submitted, nor to any of the other evidence, which consisted of numerous books of accounts and yards of figures from the adding machine.

Puzzled to know the process of the reasoning by which the verdict was reached, I questioned the foreman of the jury—himself a business man of more than ordinary ability. He said:

> Oh, H---! I didn't have time to go over all that stuff. I just figured Morris was worth a hundred and seventy-five dollars a month, and that's what we gave him.

A man acting as town marshall, shot down two men on the street. At the trial the evidence was strongly against him. The cause was submitted to the jury Saturday afternoon. At ten o'clock that night they returned a verdict of "not guilty."

Presumably, one of the most intelligent men on the jury was the editor of a newspaper in an adjoining town. He said he believed the man was guilty, but that the only chance he saw of an agreement was to work for acquittal and he wanted to catch the 10:50 train so he would not be away from home Sunday.

Then, there was the tomb-stone case. A little widow, in the first pangs of her grief, ordered a monument in memory of her departed husband. It was rather pretentious and, it seemed to me, was adequate to express the great loss sustained, when one took into consideration the size of the estate. But when the company attempted to collect, the widow denied responsibility, claiming the monument was not in accordance with the original specifications.

It became necessary to sue. The evidence was over-

whelmingly to the effect that the memorial shaft was not at all according to contract. Imagine, then, the surprise when the jury brought in a verdict for the plaintiff.

Curious to know what had happened to bring about so unexpected a circumstance, I questioned a juror. This was his answer:

> Well, when we first went in they elected me foreman. I told them we would first vote to see whether the stone was according to the contract. We did and they all voted "no." "Well," I says, "let's go in with our verdict." And one of the jurors says, "What verdict?" "Why, for the defendant," I says. But he says, "Now hold on a minute. Let's not be in too big a hurry. Let's talk this thing over. I don't care whether it's like the agent said it would be or not. I don't care what the contract called for. I've seen that grave stone and I think it's good enough for any Irishman, and I'm going to vote for the company." Well, we talked it over and he seemed to know more about it than any of the witnesses and so we decided he was right.

These juries are not exceptional; they are typical. They represent the people you see around you every day. The average business man, when called upon to serve on a jury, makes every excuse he can think of that may be necessary to relieve him. He hasn't the time to give to the settlement of other people's disputes, even though he may be claiming this right at nearly every term of court. As citizens of the state and of the county, they are unwilling to give a few days' time to the discharge of its business.

I know a man who is looked upon as one of the best citizens of his community and he so considers himself. He has held some very responsible positions and has always discharged his duty conscientiously and well, but he won't serve on a jury. His pet dodge is that he is prejudiced and could not render a fair and impartial verdict. He is the kind of man who is needed as a juror, but he refuses to serve.

Recently I made a survey of the members of our local bar association and asked each one how he felt about the

jury system as compared with a system of judges. With one exception, they all said that if charged with a crime of which they were innocent, or for the settlement of a controversy, they would more willingly submit to one fair minded judge, or, at most three, than to any twelve men, taken as most juries are drawn. They would feel more certain of receiving absolute justice. The judges understand the law and know how to apply it to the facts, and the result would be more satisfactory.

Many otherwise good jurors serve under protest and this lessens their efficiency because they are not interested in the matters submitted to them. Some are rather awed by their surrounding and think that something rather dramatic is expected of them. In trying to do what is expected of them they lay stress upon some of the less important matters, and by doing so defeat the ends of justice.

If electors were as keen to assume their responsibilities as they are to demand their rights and insist upon their privileges, justice would not be a travesty, a law suit could not be a farce and a juror might be an excellent example of true Americanism.

JURY SERVICE[6]

The Spectator has just been on jury service in a high court in the city of New York, and, as usual, is full of disgust and wrath. Mingle a sense of wasted time, wounded dignity, physical discomfort, and general vexation, and you have the explosive mixture crowding his usually placid bosom. Of all the customs, now antiquated, moth-eaten, and wasteful, saddled upon us by earlier men and conditions, the jury system is the worst —at any rate, as at present seen in the larger communities; and its disuse in more than half of the cases where it is now invoked would, in the Spectator's view, be a

[6] By "Spectator." *Outlook* 101: 647-8. July 20, 1912.

decided advantage to every one but the oligarchy of lawyers which rules us by their entangling legislation. This is positive language, but it expresses convictions.

Once in two years, if not oftener, the Spectator gets a command to come and serve on a jury in a specified court. It is brought to him by a messenger, at ten times the expense of mail or telephone. First waste. If he is out of town, his wife or someone of responsibility must go personally and explain the case to the judge; a message won't do. If he is ill, there must be presented a sworn medical certificate to that effect. These and other harsh and somewhat costly precautions are required because most men hate and seek to avoid the summons. Why?

Why? Not because of the service itself, but because of the methods employed by courts and the spirit manifested in the majority of cases. To begin, it is an unequal burden. Probably more than half of the citizenship of New York is exempt, namely, the whole class of lawyers with their helpers, all the city officials and clerks, the ministers, doctors, journalists, teachers, militiamen, firemen, policemen, employees of public service corporations, managers of large concerns (which lets out most of the rich men), and the whole class of men who work by the day. Add to this a large number who get themselves excused, often through political favor. For instance, one of the Spectator's fellow-jurymen this week told him that once, when it was extraordinarily inconvenient for him to serve, the judge repulsed his excuses with a severe rebuke as to a citizen's duty, etc. The next day he carried a letter of request from "Big Tim." "Oh!" exclaimed the magistrate cordially; "if you are too sick to act, I will excuse you gladly." The politician's letter had said nothing about any illness! Once the Spectator himself had an engagement and requested an excuse for one day. The judge turned him loose for the whole term—which was unfair to the others of the panel. So it goes.

Subtracting all these exemptions and exceptions, what is left? Practically nothing (in cities, at least) but tradesmen, small manufacturers, and commercial clerks, with a few unattached persons. They represent the average ignorance and inability rather than the average intelligence and efficiency of the community. In New York the large majority bear foreign names, and many have only a limited acquaintance with English.

Theoretically a juryman is supreme in a court trial, and the contending lawyers vie in flattering him when he is in the box. (Box is a good name for it!) Otherwise he seems to be regarded as little better than a criminal, for he is constantly under police surveillance. During all of the two—sometimes four—weeks he must report in a stuffy court-room each morning and afternoon, sit on a hard bench or chair, be hustled and jostled by rough court officers, must stay as long as the judge pleases, and may not read or write, even though not "drawn." In these days of telephones most city jurors might be called when wanted, and not be required to loaf for hours where they are of no use to any one.

If one happens to be drawn as one of the "twelve good men and true" for a particular trial, the sense of being under arrest and accusation is doubled, and fear and humiliation begin with the questioning. All that the court has a right to know, as it seems to the Spectator, is whether a juror knows or feels any reason why he cannot take an impartial view of the particular contention presented. Instead of that, one is usually questioned at length, uselessly and impertinently—insultingly, in fact—as to a lot of matters implying either a stupidity or dishonesty on his part which must be ferreted out. The reference is now to the minor cases which occupy nine-tenths of the time in all courts, not to the occasional case of great importance. What difference ought it to make, for example, whether you do or do not happen to know any of the counsel or members of their office

staffs? The Spectator was once rejected in a trifling criminal action at which Mr. Jerome, then District Attorney, was not present, because he happened to belong to a club of which the District Attorney was a member. Many lawyers practicing in the city and the Supreme Courts are ignorant and uncivil, and when you have passed through an examination under their suspicious eyes and methods you feel so hostile that your initial fairness is pretty nearly destroyed. You may be thankful if you have any self-respect left.

Finally the trial begins. At once the jury is treated as though it were composed of children and fools. Not only are the simplest, most rudimentary matters elaborated, logic defied, natural conclusions impeached, and material facts suppressed as far as possible on each side, but hours are wasted in attempts to throw dust in the jury's eyes. Furthermore, nearly all cases are presented wrong end foremost. Judges and lawyers seem leagued to make every trial as long as possible, forcing the conviction upon the listener's mind that both counsel are "nursing the job." This is especially true of civil cases. The Spectator recalls a typical instance, although by no means one of the most flagrant ones. A small haberdasher had his little shop accidentally set on fire (as charged) by a workman installing a certain style of lamp. He sued the lamp concern to recover the value of his ruined stock. The first and essential question to the ordinary man's mind would be as to liability. If that were not shown, the matter of damages would fall to the ground. Was this considered first? Not at all. The first day was wholly consumed in reading an inventory, prepared at large expense, of every article in that man's stock—so many dozen socks at such a price, so many collars at such a price, so many of another price, and so on, in spite of the fact that a package of receipted bills for it all lay on the table. Then cross-examination went over the whole again to try to find a box of collars

or a dozen neckties out of the way. And the whole stock amounted to less than $1,500 in value. It was not until the next day that the question of liability was attacked.

Right here is one great element in the "law's delay" so much complained of. Take a fresher illustration. Just last week the Spectator sat for three whole days on a jury in a case where a bricklayer, entering a building in course of construction to apply for work, as is the custom in that trade, fell down an open hoistway and was greatly injured. He sued three concerns, owners and contractors, collectively for damages. It appeared almost from the start that the crucial point was the status of the complainant with reference to the duty of care to be exercised toward him by the house-builder, the lessor, and the lessee of the hoisting elevator, *et al.* Yet hour after hour all small details were testified to as to the building, its structure, contents, how the man fell, how dreadfully he was hurt, etc., etc., none of any consequence whatever until the pivotal point of liability was fixed. If the complainant had no legal standing, this testimony was utterly useless. There was one examiner in particular who would have tried the patience of a doubly sanctified Job. In a slow, unmodulated, unsmiling voice, as rasping, mechanical, and dispassionate as a gramophone, he bored on and on with insistent repetitions and doubts and queries, the major, if not the only, purpose of which was to rattle a witness and befog the jury. It is probably no exaggeration to say that he asked a hundred questions as to measurements in feet and inches hither and yon, when all the time there lay upon his table a plan of the building which would have supplied the information in five minutes. Every juryman dreaded his rising—a most unfortunate impression for a hopeful advocate.

Finally, in the afternoon of the third day, the question of status, which everybody had so ingeniously

avoided, could no longer be escaped; and half an hour's argument, altogether remote from the testimony adduced, showed that the complainant had no legal standing and the whole case was dismissed. Meanwhile the jury had sat as prisoners in a cramped pen for three days, during which the remainder of the panel had been obliged to come and go uselessly six times; and all this waste of time and burden of annoyance had gone for naught because of the cart-before-the-horse procedure.

Is it any wonder a man of ordinary intelligence and taste hates jury duty?

JURY TRIALS IN CIVIL CASES[1]

A criminal case is a *public* matter, in the decision of which all the *public* are concerned. A difference between two citizens is a *private* matter, in which the public, except so far as providing the means for the peaceful and orderly settlement of such differences, is not concerned. To talk about the jury system as the "buttress of liberty," in this country where the people control the government, and especially in connection with civil cases, is the sheerest nonsense. The resort to the system in civil cases must depend upon its efficiency as an agency in the administration of justice. Is it promotive of justice in the matter of the settlement of private differences? Is a system ethical that drags private differences before the public, which asks a section of the public to retire into the privacy of a jury room and in secret session decide such differences and then make up a public record for all time of such private differences?

All sorts of suggestions have been made for improving the jury system: how to draw the jury, who is to serve on the jury, how far the judge may go in instructing the jury, whether it shall be permissible to cross-

[1] From article "Substitute for Jury Trials in Civil Cases," by Percy Werner. *Public.* 22: 957-9. September 6, 1919.

examine the jury by way of special interrogatories as to their verdict, as to whether the requirement as to unanimity shall be discarded. But the fundamental question still remains, is the system ethical? The tragedy of reforms is that the more you attempt to render ethical an institution which is inherently unethical, the more you postpone the abandonment of such institution. And the tragic situation of lawyers is that they are compelled to practice law according to a legal procedure adopted and demanded by the people, and then are condemned by the people for not squaring their practice of law up to some undefined popular notion of ethics. Does the jury system in civil cases encourage pettifoggers, ambulance chasing, "shystering"? Does it tend to raise the standard of the bar? Does it increase the confidence of the public in the administration of justice in this country? Does it conduce to respect for the law? These are some of the ethical considerations.

There is further an economic side to this question, involving the wastage of human effort, which is important. How many men in this country are annually called from their work to sit on juries—mechanics from their machines, bookkeepers from their accounts, clerks from their desks, farmers from their plows, etc., and what is the direct and indirect pecuniary loss resulting from such interruptions? Does the public understand and appreciate the system which it supports for the administration of "justice"? The cooperation of a keenly alive, intelligent public with the lawyers in their efforts to improve the administration of justice and respect for the law in this country is needed.